

No. 25-

IN THE
Supreme Court of the United States

GAME PLAN, INC.,

Petitioner,

v.

UNINTERRUPTED IP, LLC,

Respondent.

**ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED
STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT**

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the Court of Appeals for the Federal Circuit erred in holding that common law trademark rights are superior to and can displace a federally registered trademark; and
2. Whether the acquisition of common law trademark rights after the commencement of a inter partes proceeding is an appropriate mechanism, which can defeat a federally registered trademark for a cancellation proceeding.

PARTIES TO THE PROCEEDING

Petitioner Game Plan, Inc., was the Opposer and Counter-Opposed in the opposition proceeding before the Trademark Trial and Appeals Board, and the Appellant before the Court of Appeals for the Federal Circuit. Game Plan, Inc., is non-profit organization, organized under the state laws of Maryland. It is not a publicly traded organization with a stock ticker label.

The Respondent is Uninterrupted IP LLC, who was the Opposed, and Counter-Opposer in the opposition proceeding before the Trademark Trial and Appeals Board. Uninterrupted IP LLC was the Appellee before the Court of Appeals for the Federal Circuit. It is a limited liability company. The Respondent is not a publicly traded company with a stock ticker label.

CORPORATE DISCLOSURE STATEMENT

Petitioner Game Plan, Inc. is a non-profit corporation formed under the laws of the State of Maryland, and has no parent corporation, and has no other ownership, nor having a publicly held company owning 10% or more of the corporation's stock.

LIST OF ALL PROCEEDINGS

1. Game Plan, Inc. Appellant v. Uninterrupted IP LLC, Appellee, Case No. 24-1407, Court of Appeals for the Federal Circuit. December 10, 2025 Affirmed. January 26, 2026 Rehearing Denied. February 2, 2026 Mandate issued.
2. Game Plan, Inc., Opposer v. Uninterrupted IP LLC, Respondent, Opposition No. 91244990, December 14, 2026, Final Decision in favor of Uninterrupted IP LLC to cancel Game Plan Inc.'s Federally Registered mark.
3. Game Plan, Inc. v. ESPN, Inc, Nike, Inc., Take-Two Interactive Software, Inc., Case No. 20-cv-455 (DLF), April 15, 2026, a stay entered pending resolution of all appeals.

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PETITION FOR A WRIT OF CERTIORARI

Game Plan, Inc. respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Federal Circuit in this case.

OPINIONS BELOW

The opinion of the Court of Appeals for the Federal Circuit regarding amendments to applications with common law acquisitions and common law rights cancelling a Federal Registration is reported at 160 F.4th 1377. The Trademark Trial and Appeals Board final decision cancelling Petitioner's Federally Registered Trademark can be found at 2023 TTAB LEXIS 539.

JURISDICTION

The judgment of the court of appeals was entered on December 10, 2025. A Petition for Rehearing by the Panel was filed on January 8, 2026, and it that petition for rehearing was denied on January 26, 2026 (App., *infra*, 42a). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

The relevant provisions of the Lanham Act of 1946, Pub. L. 79-489, 60 Stat. 427, are reproduced in the appendix to this petition (App.44a, *infra*, 44a-69a). The relevant of the provisions of the Code of Federal Regulations, chapter 37, subsection 2.133(a) as promulgated are in the appendix to this petition App.70a-75a.

STATEMENT

The Petitioner, Game Plan, Inc. believes it compelling since the Trademark Trial and Appeal Board's ("the Board") application of 15 U.S.C. §§ 1060, 1115, 1068, 1057, which was affirmed by the Court of Appeals for the Federal Circuit conflicts with plain language of the law and precedent of United States court of appeals.

The Honorable Panel of the Federal Circuit Court of Appeals cannot conclude that common law rights acquired after the commencement of a inter partes proceeding are superior to a federally registered trademark.

Petitioner is a non-profit organization that applied to register a stylized mark incorporating the phrase "I Am More Than An Athlete GP. Game Plan" (Registration No. 5487497) on December 28, 2016. On June 5, 2018, the United States Patent and Trademark Office registered the mark for "charitable fundraising services by means of selling t-shirts to raise funds for educational and entertainment programs."

The Respondent is a media company that, in March 2018, filed six intent-to-use applications for marks incorporating variations of "I Am More Than An Athlete" and "More Than An Athlete" covering clothing and entertainment services. On June 5, 2018, as just stated, Game Plan received its registration for its mark. On November 28, 2018, Petitioner initiated an opposition proceeding before the United States Patent and Trademark Office's Trademark Trial and Appeals Board ("TTAB" of "the Board") to oppose Respondent's applications, asserting likelihood of confusion and priority.

As is relevant here, on November 28, 2018 the Petitioner opposed Uninterrupted IP LLC's six intent-to-use applications for variations for the mark "I Am More Than An Athlete" and "More Than an Athlete" on the grounds that those applied-for marks were confusingly similar to the Petitioner's "I Am More Than An Athlete. GP. Game Plan" mark for the sell of t-shirts to fund a non-profit.

Respondent filed extensions to answer. Respondent then answered and counterclaimed to cancel Petitioner's registration under Section 2(d), asserting priority based on ownership of a federally registered mark, and common law rights in the "I Am More Than An Athlete" mark and "More Than an Athlete" marks. These allegations were based on the acquisition made on February 22, 2019.

On December 14, 2023 the Board determined that because of the February 22, 2019 acquisition which also conveyed common law rights, those common law rights became superior to the Petitioner's federally registered mark, and therefore Respondent had priority and the ability to cancel Petitioner's mark, and stated "The six opposed Applications shall proceed." App.41a. The Petitioner appealed to the Court of Appeals for the Federal Circuit.

On December 10, 2025, The Court of Appeals for the Federal Circuit affirmed the Board's determination, holding (among other things) that the language of C.F.R. § 2.133(a) "amendment in substance" did not apply to an acquisition of common law rights. App.10a. Moreover, the Respondent's common law rights do supersede the Petitioner's federally registered mark. App.11a. The Panel there stated, "[t]hus, UNIP's common law rights would still establish priority over Game Plan's registration

independent of any constraints imposed by § 2.133(a).” Id. However, common law rights are junior to Game Plan’s mark. Pursuant to Supreme Court Rule 12(a), relevant here under the Lanhan Act, 15 U.S.C. § 1115(b)

“[t]o the extent that the right to use the registered mark has become incontestable under section 1065 of this title, the registration shall be conclusive evidence of the validity of the registered mark and of the registration of the mark, of the registrant’s ownership of the mark, and of the registrant’s exclusive right to use the registered mark in commerce.”

Also, under the Lanham Act, at 15 U.S.C. § 1068:

“[i]n such proceedings the Director may refuse to register the opposed mark, may cancel the registration, in whole or in part, may modify the application or registration by limiting the goods or services specified therein, may otherwise restrict or rectify with respect to the register the registration of a registered mark, may refuse to register any or all of several interfering marks, or may register the mark or marks for the person or persons entitled thereto, as the rights of the parties hereunder may be established in the proceedings.”

The Code of Federal Regulations promulgated under § 1068 of the Lanham Act makes clear that “[a]n application subject to an opposition may not be amended in substance***” 37 C.F.R. § 2.133(a).

The Board allowed the use of common law rights, which are junior to Game Plan's mark to establish priority for the purposes of Uninterrupted IP's applications, in order for them to proceed. This decision violates the code, and makes junior common law rights superior to Federally Registered rights.

To date, this case has been critically analyzed in periodicals, podcasts and used as reference by legal professionals analyzing best practices and nuances of trademark law and procedure. App.83a-86a. As it comes to this Court, the case presents two exceptionally important questions concerning common law rights versus federal trademark registrations and procedure. Because as the Court of Appeals for the Federal Circuit has left it, there are ambiguous outcomes as a result of their decision. One such ambiguity is: when the common law rights are acquired, what then is the operable date of priority.

The first question is whether common law rights can defeat a federally registered trademark. In the United States, as a first-to-use system, those common law rights create a protection that are generally limited to the geographic area where the mark is used, if another entity files and receives the federal protection first. The Petitioner seeks consideration of those same geographically limited common rights being subject to a rule that precludes "an amendment in substance" to an application for a trademark on an intent-to-use basis (meaning since those common law rights were not claimed in the application being opposed, how are they to be adopted into its ownership reliance without amendment of their applications). The first question seeks clarity on gaining when those common laws rights are acquired,

how then those common law rights become senior to a federally registered mark. Therefore, seeking the Supreme Court's analysis on how common law rights can or cannot supersede a federally registered mark.

The second question dives deeper into when those rights, whether junior or not can be acquired during an opposition proceeding. Then assuming if they can be acquired, what is their exposure to be held liable for infringement against a federal registered mark when using the common law mark in those geographic areas, versus being able to use those same rights to cancel a federally registered mark, as a precedent case speaks to this point very. *Burger King of Fla., Inc. v. Hoots*, 403 F.2d 904.

This case involves a high-profile dispute between Uninterrupted IP LLC that is associated with one of the most recognizable sports figures in the world, LeBron James. The Opposition action before the Board commenced November 28, 2018, and a lawsuit for infringement was filed by the Petitioner against Uninterrupted LLC, ESPN, NIKE, and Take-Two Interactive Software, Inc. who were alleged to infringe upon Game Plan's federally registered mark, as a result of licensing agreements with Uninterrupted IP LLC for uses predating the February 22, 2019 asset assignment agreement, which the TTAB, and the Federal Circuit decided was legal and valid means to gain priority to Game Plan, Inc.

Game Plan operated and sought to protect its rights lawfully acquired as a result of its registration U.S. Registration Number 5,487,497. Game Plan's registration

is prima facie evidence of continuing use of the registered mark beginning on the filing date of the application on which the registration was granted. *Charles of The Ritz, Inc. v. Elizabeth Arden Sales Corp.*, 34 C.C.P.A. 1029, 1032, 161 F.2d 234 (C.C.P.A. 1947); see also *Gillette Co. v. Kempel*, 45 C.C.P.A. 920, 922, 254 F.2d 402, 404 (C.C.P.A. 1958). In the December 14, 2023 Final Decision, the Board cites to *Karsten Mfg. Corp. v. Editoy AG*, 79 USPQ2d 1783, 1790 n.9 (TTAB 2006), as a basis for substantiating Uninterrupted IP LLC's acquisition of rights, and standing in the shoes of the assignor. But that case also relies on the *Charles of the Ritz* case explaining the Petitioner's rights, which leaves the Board's references in a contradictory posture. To say the least, the Board and the Federal Circuit do not create a clear standard, instead their respective rulings create numerous contradictions between statutory language of the Lanham Act, and displacing long standing concepts that common law rights are junior to federally registered rights.

Since mid-June 2018, Uninterrupted IP LLC entered into several licensing agreements giving others "exclusive" rights to use "I AM MORE THAN AN ATHLETE" marks prior to having a registered mark, or acquiring any common law rights from a third party. See *Game Plan, Inc. v. ESPN, Inc.*, No. 20-cv-455 (DLF), 2020 LX 69487, at *1 (D.D.C. Oct. 9, 2020), see also App.15a-17a

The Board, in reaching its December 14, 2023 Final Decision, made contradictory statements about the record before it, especially what evidence Game Plan, Inc. had available to support its opposition. Consider, Trademark Rule 2.122(b)(1) automatically allows the Petitioner's U.S.

Registration Number 5,487,497 into the record of the proceeding without any action by the parties. App.70a. In the Final Decision by the Board they contradict itself stating that Game Plan's opposition was dismissed because it entered no evidence, but then wrote " ... the record of Game Plan's Registration is now part of the trial record by operation of Trademark Rule 2.122(b)(1), 37 C.F.R. § 2.122(b)(1), ... this fact saved Game Plan's Opposition from dismissal for failure to prosecute under Trademark Rule 2.132, it leaves Game Plan with no other evidence to support those claims." App.20a-21a.

After years of litigation, the Federal Circuit affirmed the Board's Final Decision because the Panel there stated that the acquired common law rights were enough to cancel the federal registered mark without any reference to any precedent for such a finding. App.11a. The Federal Court reached its conclusion stating that since no case law was available to show that Uninterrupted IP LLC's common law acquisition was "an amendment in substance" to the six intent-to-use applications, 37 C.F.R. § 2.133(a) does not apply (see App.10a) and simply relied upon the Board's arbitrary and fanciful finding. The Court of Appeals for the Federal Circuit affirmed the Board's Final Decision stating that Game Plan misapplies 15 U.S.C. 1060(a)(1), while also finding that the February 22, 2019 "assignment was recorded by UNIP, which constitutes prima facie evidence of the execution of the underlying assignment" (see App.33a) citing to Trademark Act Section 10(a)(3), 15 U.S.C. § 1060(a)(3).

However, in order for an assignment to be recognized, pursuant to 15 U.S.C. § 1060(a)(1) an amendment is required. The Federal Circuit states that is a misapplication of the

law here because “UNIP did not assign its pending intent-to-use applications. Rather, it received an assignment of preexisting common law rights to an already-used mark.” App.9a-10a. This technical choice avoids the true spirit of the law. The Federal Circuit stated section 1060(a)(1) does not prohibit the assignment of the third party’s common law rights, to the applicant. Thus, UNIP did not violate § 1060(a)(1) when it purchased common law rights to the mark MORE THAN AN ATHLETE.” App.10a.

The Board decided under 15 U.S.C. 1060(a)(3) that “the trademark assignment means that UNIP stands in the shoes of [the third party], and [Uninterrupted Ip LLC], therefore, has established priority for purposes of its counterclaim.” See App.37a.

The Board’s decision to favor Uninterrupted IP LLC’s position to cancel Game Plan’s U.S. Registration with the February 22, 2019 acquired common law rights is arbitrary and without any statutory, regulatory, or precedential authority. The Federal Circuit affirmed.

Game Plan petitions here that that finding contradicts the Lanham Act and case law making federally registered marks superior to the junior rights of common law. The Federal Circuit followed the Board’s arbitrary and fanciful finding on appeal stating, “UNIP’s common law rights would still establish priority over Game Plan’s registration independent of any constraints imposed by § 2.133(a).” See App.11a. This is wrong. That arbitrary and fanciful findings is contradicted by the Lanham Act Section 1115(b)(5). Courts have consistently interpreted § 1115(b)(5) as conferring “upon a junior user the right to continued use of an otherwise infringing mark in a remote

geographical area if that use was established prior to the other party's federal registration." See *Thrifty Rent-A-Car Sys. v. Thrift Cars, Inc.*, 831 F.2d 1177 (1st Cir. 1987). Thus, Uninterrupted IP LLC's February 22, 2019 common law rights are junior to Game Plan's federally registered mark, and they only have protection in a limited geographic area.

Because this case is an optimal vehicle for addressing the exceptionally important questions presented, the Petition for a Writ of Certiorari should be granted.

A. Background/Procedural History

On November 28, 2018, the Petitioner opposed all six applications for trademark of Uninterrupted IP LLC that were filed on March 10, 2018, based on an alleged intent-to-use the marks in commerce, under Section 1(b) of the Trademark Act, 15 U.S.C. § 1051(b). The Petitioner's Registration No. 5487497 was issued on June 5, 2018, from an underlying application filed December 28, 2016 under Trademark Act Section 1(a), 15 U.S.C. § 1051(a). On February 22, 2019 Uninterrupted IP LLC entered into a purchase agreement and asset assignment of a third party's trademark. Subsequently, Uninterrupted IP LLC filed an answer and counterclaim alleging priority. In the Board's Final Decision it writes, "UNIP's priority claim is somewhat complicated***" as it depends on UNIP's February 22, 2019 asset acquisition. Game Plan's registered mark is for "[c]haritable fundraising services by means of selling t-shirts to raise funds for educational and entertainment programs," in International Class 36. The third party rights Uninterrupted IP LLC acquired were for "publicity and sales promotion services" in International Class 35.

In February of 2020, Game Plan filed a Complaint in the District Court of the District of Columbia alleging infringement against ESPN, Inc., NIKE Inc., UNINTERRUPTED LLC, and TAKE-TWO INTERACTIVE SOFTWARE, Inc. That matter is stayed pending the resolution of priority before any appeals thereto.

On August 7, 2025 the Petitioner and Uninterrupted IP LLC argued before a three judge panel at the Court of Appeals for the Federal Circuit. On December 10, 2025 the Federal Circuit decided to affirm the Board's decision. Game Plan filed a Petition for Rehearing by the Panel, which was denied on January 26, 2026. The Federal Circuit issued a Mandate on February 2, 2026. The Petitioner now seeks this Court's review.

On October 8, 2017, administrators of Game Plan, Inc., with a group of its members attended a Washington Wizards pre-season National Basketball Association Basketball game against the Cleveland Cavaliers, which the principal-owner of Uninterrupted IP LLC, LeBron James was a team member. In the complaint filed with the District Court of the District of Columbia, Game Plan alleged with photographic evidence the proximity of the children wearing the "I AM MORE THAN AN ATHELTE. GP. GAME PLAN" t-shirts. In February of 2018, LeBron James and Laura Ingraham got into a war of words. Laura Ingraham told LeBron James to "shut up and dribble." App.80a.

LeBron James responded with comments and an Instagram post of a neon customized sign with the words "I Am More Than An Athlete." App.78a.

In July 2018, Uninterrupted IP LLC began entering into licensing agreements with the defendants in the District Court matter, before the Opposition action before TTAB was filed, then leading to the filing of the 2020 District Court complaint, which is stayed.

REASONS FOR GRANTING THE PETITION

These federal questions are of national impact as a result of the Court of Appeals for the Federal Circuit's Panel misapprehending the Board's decision; and adopting those extraordinary incongruences of law into its Decision creating a harmful precedent, which should be reversed. App.1a; see also 60 F.4th 1377. Game Plan was denied its inherent rights under the Lanham Act, 15 U.S.C. §1115 *et. seq.* and Trademark Rule 2.122(b)(1), 37 C.F.R. § 2.122(b)(1) which create an automatic and presumption of rights, and forms part of the record of the proceeding without any action by the parties, by repeatedly suggesting Game Plan had no evidence on the trial record. Next, the Federal Circuit adopted that junior common law rights supersede Game Plan's federally registered trademark without reference to any authority but now create that authority.

A. This Court should grant review to decide whether common law rights are no longer junior to federally registered trademarks

The Federal Circuit did not apply the geographic limitations on common law rights precedent. This principle was clearly articulated in *Burger King of Florida* where the court held that "owners of a federally registered trademark have the 'incontestable' right to use the mark

in commerce, except to the extent that such use infringes what valid right defendants have acquired by their continuous use of the same mark prior to the owners' federal registration." *Burger King of Fla., Inc. v. Hoots*, 403 F.2d 904 (7th Cir. 1968). The complexity that the Board acknowledged should include that Uninterrupted IP LLC's use of the common law marks commenced on February 22, 2019, not 2013. But also, if Uninterrupted IP LLC stands in the shoes of the assignor, then it stands in the shoes, that allowed Game Plan's mark to proceed to registration over any objection or opposition the third party did or did not make. And those same junior common law rights cannot now defeat Game Plan's federally registered mark.

The Federal Circuit is therefore finding that the February 22, 2019 acquisition transports Uninterrupted IP LLC's first use as to the common law rights it acquired in 2013, which fundamentally changes Uninterrupted IP LLC's representations in its intent-to-use applications, without requiring an amendment. This is problematic as it commutes federal registered trademark principles to common law, such as date of use versus date of filing. The ruling is improper and without a legal basis. Thus, it is an arbitrary and fanciful conclusion.

The Federal Circuit should have looked to the *Burger King* court which specifically held that "the district court properly decided that plaintiff's federal registration of the trademark 'Burger King' gave them the exclusive right to use the mark in Illinois except in a limited market area." *Id.* This principle is codified in the Lanham Act Section 1115(b)(5). Courts have consistently interpreted § 1115(b)(5) as conferring "upon a junior user the right

to continued use of an otherwise infringing mark in a remote geographical area if that use was established prior to the other party's federal registration." See *Thrifty Rent-A-Car Sys. v. Thrift Cars, Inc.*, 831 F.2d 1177 (1st Cir. 1987). So even if Uninterrupted IP LLC is allowed to stand in the shoes of the third party, relating back to 2013, it would only establish that Uninterrupted IP LLC is protected from a trademark infringement claim in those limited geographical areas where the third party rights were established.

However, no common law rights can displace the 15 U.S.C. § 1115 et. seq. rights of Game Plan.

Similarly, 15 U.S.C. § 1057(c) provides that "the filing of an application to register a mark shall confer a right of priority, nationwide in effect, against any other person except for a person who, prior to such filing, has used the mark." See *Lucent Info. Mgmt. v. Lucent Techs., Inc.*, 186 F.3d 311 (3d Cir. 1999). This provision establishes the principle of constructive use, which "can arise under the Lanham Act § 7(c), 15 U.S.C.S. § 1057(c), which grants priority, based on filing date, to a U.S. application." See *Aktieselskabet AF 21 November 2001 v. Fame Jeans Inc.*, 381 U.S. App. D.C. 76, 525 F.3d 8 (2008).

The evidence before the Board established that a third party made use of the "MORE THAN AN ATHLETE" mark inside of gymnasiums during weekend basketball tournaments in certain localized uses in certain states. App.28a. The Federal Circuit affirming the TTAB decision accepts that those limited expositions of the third-party's mark had effect of being senior to a Federally Registered mark.

Courts have consistently held that “federal registration has the practical effect of freezing a prior user’s enforceable trademark rights thereby terminating any right to future expansion beyond the user’s existing territory.” *Tana v. Dantanna’s*, 611 F.3d 767 (11th Cir. 2010). The Board and the Federal Circuit ignored this precedent and gave power to Uninterrupted IP LLC that does not exist. This principle was articulated in *Allard Enterprises, Inc. v. Advanced Programming Resources, Inc.*, where the court explained that “in the case in which a junior user applies for registration the extent of the senior user/non-registrant’s territory is frozen as of the date of actual registration to the junior user.” see *Allard Enters. v. Advanced Programming Res., Inc.*, 249 F.3d 564, 568 (6th Cir. 2001). This gives clear guidance which the Federal Circuit deviated from. UNIP’s territory was frozen, as of June 5, 2018.

The Seventh Circuit in *Burger King* further explained that “Congress expanded the common law by granting an exclusive right in commerce to federal registrants in areas where there has been no offsetting use of the mark.” See *Burger King of Fla., Inc. v. Hoots*, 403 F.2d 904 (7th Cir. 1968). The court emphasized that “Congress intended the Lanham Act to afford nation-wide protection to federally-registered marks, and that once the certificate has issued, no person can acquire any additional rights superior to those obtained by the federal registrant.” *Id.* That means, on June 5, 2018, Uninterrupted IP LLC could acquire additional rights superior to those obtained by Game Plan; therefore, the February 22, 2019 acquisition cannot give Uninterrupted IP LLC additional rights superior to those of Game Plan, Inc., the Petitioner.

Under § 1057(c), the filing of Game Plan’s application constituted constructive use of the mark, conferring a right of priority nationwide except against persons who had used the mark before such filing. 15 U.S.C. § 1057.

The Lanham Act provides that:

“contingent on the registration of a mark on the principal register provided by this Act, the filing of the application to register such mark shall constitute constructive use of the mark, conferring a right of priority, nationwide in effect, on or in connection with the goods or services specified in the registration against any other person.”

See 15 U.S.C. § 1057.

This nationwide priority is subject only to the exception for “a person whose mark has not been abandoned and who, prior to such filing” has used the mark. 15 U.S.C. § 1057.

Registration under the Lanham Act provides significant benefits beyond common law protection. As the court explained in *Natural Footwear*, “registration of a trademark, in addition to serving the interests of the registrant by providing constructive notice, serves the interests of other participants in the market place.” *Nat. Footwear, Ltd. v. Hart, Schaffner & Marx*, 760 F.2d 1383 (3d Cir. 1985).

Game Plan’s mark should not be cancelled and Uninterrupted IP LLC’s protection should be limited

to the geographic location of any common law rights it acquired, for purposes to limit any infringement by Game Plan against Uninterrupted IP LLC, given its more recently acquired junior rights to Game Plan's mark. Therefore, holding that Uninterrupted IP LLC's acquisition of common law rights is not an "amendment in substance" under 37 C.F.R. § 2.133(a), is incorrect. But should be secondary given the aforementioned. The Panel did not apply the well-established geographic limitations on common law trademark rights as articulated in *Burger King of Florida, Inc. v. Hoots* and in other courts of appeals. Even if Uninterrupted IP LLC validly acquired common law rights which happen to predate Game Plan's federal registration, those rights are geographically limited to the areas where UNIP's predecessor actually used the mark. And only to the extent to protect it from any claims of infringement by Game Plan in those protected areas.

In *Paleteria La Michoacana, Inc. v. Productos Lacteos Tocumbo S.A. De C.V.*, 69 F. Supp. 3d 175, 188 (D.D.C. 2014) that court explained that trademark rights are geographically limited to areas where the mark is actually used in commerce or where it might naturally expand. That court emphasized that an unregistered mark can be protected under Section 43 of the Lanham Act if it qualifies for registration, and that common law rights require evidence of market penetration or natural expansion. Here, Game Plan opposed Uninterrupted IP LLC's registration and Game Plan should have succeeded.

"The policy ... to provide protection of federally registered marks used in interstate commerce, 'may not be defeated or obstructed by State law' and [if] state law

conflicts with the policy it ‘must yield to the superior federal law.’” *Davidoff Extension S.A. v. Davidoff Comercio E Industria Ltda.*, 747 F. Supp. 122, 126-27 (D.P.R. 1990) citing *Burger King of Florida*. Furthermore, “state law cannot defeat or limit in any way the protection given to federally registered marks under the Lanham Act.” *American Auto. Ass’n, (Inc.) v. AAA Ins. Agency, Inc.*, 618 F. Supp. 787, 798 (D. Tex. 1985).

Accordingly, granting this petition will set the appropriate guidelines for common law rights as they relate to federally registered marks.

B. This Court should grant review to decide whether an assignment of common law rights after the commencement of a TTAB action is an “amendment in substance” under the Lanham Act

Uninterrupted IP LLC did not use the common law rights prior to Game Plan. They only acquired them after the Notice of Opposition. The intent-to-use applications which are allowed to proceed should be conclusive evidence that Respondent would have to amend its application to establish priority to Game Plan, to allow their applications to proceed.

This interpretation undermines the integrity of the trademark registration system, which is designed to provide certainty and predictability to market participants. As the court has recognized, “the benefits of prior registration under the Lanham Act are justified in light of the order such registration brings to the market place.” *Nat. Footwear, Ltd. v. Hart, Schaffner*

& Marx, 760 F.2d 1383 (3d Cir. 1985). The Federal Circuit’s interpretation disrupts this order by allowing applicants to change their legal position during opposition proceedings. 37 C.F.R. § 2.133(a), serves the critical purpose of preventing parties from changing their legal position after opposition proceedings have begun, thereby ensuring fairness and finality in trademark proceedings.

In *Brunswick Corp. v. British Seagull Ltd.*, 35 F.3d 1527, that court discussed 37 C.F.R. § 2.133 amendment of application or registration in the context of amendments during inter partes proceedings. The regulation prohibits “amendments in substance” to an application subject to opposition unless there is consent from the opposing party and approval from the Board, or upon a motion granted by the Board. The case emphasized that the TTAB evaluates applications as they were published for opposition (the intent-to-use applications by Uninterrupted IP LLC) unless the procedural requirements for amendment under § 2.133(a) are met. This suggests that an “amendment in substance” refers to changes that could affect the nature or scope of the application, such as altering the description of the mark or the goods/services covered, which would require procedural compliance and approval. *Brunswick Corp. v. British Seagull Ltd.*, 35 F.3d 1527.

Additionally, in *Brooklyn Brewery Corp. v. Brooklyn Brew Shop, LLC*, 17 F.4th 129, that court highlighted that the TTAB considers whether proposed amendments meet specific criteria, among other things. This indicates that substantive amendments are those that could materially impact the scope or enforceability of the trademark rights at issue. See *Brooklyn Brewery Corp. v. Brooklyn Brew Shop, LLC*, 17 F.4th 129.

While these cases do not provide a precise definition of an “amendment in substance,” they illustrate that the term encompasses changes that significantly alter the application or registration, particularly in ways that could affect opposition or cancellation proceedings.

Opposition to registration of a pending application is governed by 15 U.S.C. § 1063; and that 37 C.F.R. § 2.133 covers the amendment of applications subject to an opposition proceeding. *Ssg Baseball, LLC v. Select Sports Grp., LLC*, Civil Action No. 3:15-CV-0966-D, 2015 U.S. Dist. LEXIS 106475, at *15 (N.D. Tex. Aug. 13, 2015)

But the Board without citing to any precedent, any regulation, or any statute or other legal treatise determines that common law rights can defeat Game Plan’s registered trademark. The Board did peculiarly rely on the *Dial-A-Mattress* case (*Dial-A-Mattress Operating Corp. v. Mattreess Madness, Inc.* 841 F. Supp. 1339, 33 USQ2d 1961, 1967, n.10 (E.D.N.Y. 1994) (citing *Money Store v. Harriscorp Fin., Inc.*, 689 F.2d 666, 678 (7th Cir. 1982)). The Board relies on that case to establish the timing of the acquisition was not problematic during these proceedings. However, the facts of that case are discernible from the facts here, and cannot apply. The Federal Circuit seemed to agree that case was not compelling but still decided that Uninterrupted IP LLC’s junior common law rights could defeat Game Plan’s Federally Registered rights. The Federal Circuit’s interpretation of this regulation to not encompass separate acquisitions of common law rights during the opposition proceeding fails to recognize that such an acquisition fundamentally alters parties’ legal position in relation to an opposer’s registered mark. In other words, Uninterrupted IP LLC could not allege

priority to Game Plan but for reliance on that February 22, 2019 common law rights acquisition. However, those junior common law marks should not defeat Game Plan's federally registered mark. See 15 U.S.C. §1115 *et. seq.*

Before acquiring common law rights from the third party on February 22, 2019, Uninterrupted IP LLC had no priority over Game Plan's mark, which was filed on December 28, 2016, and registered on June 5, 2018. The Board asserted priority for Respondent based on the acquired rights, fundamentally altering Respondent's legal position, as an "amendment in substance" to its pending applications. Assuming, *arguendo*, the Federal Circuit and the Board treat the Opposition action with Uninterrupted IP LLC as a counterclaimant in a cancellation proceeding, with properly acquired common law rights, those common law rights cannot defeat Game Plan's federally registered marks. However, the acquisition of those common law rights, was an "amendment in substance" of its application because it converted Uninterrupted IP LLC from being an intent-to-use applicant, to an Opposer-Plaintiff with common law rights. Without the acquisition after the Opposition action commenced Uninterrupted IP LLC could not change its posture. But the application still fails because those common law rights were frozen on June 5, 2018 when Game Plan's rights were federally registered.

The Federal Circuit held that "Section 2.133(a) governs amendments to pending applications or registrations during opposition or cancellation, but does not govern the independent transfer or acquisition of common law rights to a mark." See App.10a. As referenced in *Karsten Mfg. Corp. v. Editoy AG*, 79 USPQ2d 1783, 1790 n.9 (TTAB 2006), as cited by the Board below, in that case

App.33a “the Board found there, the Opposer’s motion for summary judgment is granted in each opposition only to the extent that applicant is allowed until thirty (30) days from the mailing date of this order to file a motion with the Board to amend its applications to change the basis for registration of these applications”. See *Karsten Mfg. Corp. v. Editoy AG*, 2006 TTAB LEXIS 154, *22. Essentially, the Board should have ruled that if Uninterrupted IP LLC wanted to claim those common law rights, it would need to amend its applications. But if Uninterrupted IP LLC wanted to proceed with new applications claiming those February 22, 2019 common law rights, it would be limited to the frozen ability to expand because of the June 5, 2018 Game Plan registration.

The Federal Circuit incorrectly accepts that the Board could rule to cancel Game Plan’s registration based on common law rights acquired since the independent acquisition of rights is unregulated. Moreover, as argued above those common law rights are junior to Game Plan’s federal registration, and therefore, even if this section does not apply, those common law rights cannot cancel Game Plan’s mark, but only provide geographical limitations to infringement claims by Game Plan against Respondent.

The Federal Circuit reaches this conclusion as a case of first impression. This interpretation fails to recognize the functional equivalence between amending an application in substance and acquiring separate rights that are then used to change its stance after the opposition commenced. That February 22, 2019 acquisition is precisely what 37 C.F.R. § 2.133(a) is designed to prevent.

The Lanham Act provides that “the intent of this Act is to regulate commerce within the control of Congress by making actionable the deceptive and misleading use of marks in such commerce” and “to protect registered marks used in such commerce from interference by State, or territorial legislation.” 15 U.S.C. § 1127, App.68a. This protection is undermined if applicants can circumvent the prohibition on substantive amendments during opposition proceedings by acquiring common law rights after an opposition has been filed. Lastly, the “anti-trafficking” provisions of the Lanham Act should act to inform the interpretation of 37 C.F.R. § 2.133(a).

In *Emerald Cities Collaborative, Inc.*, the Federal Circuit recognized that agreements that effectively accomplish an assignment of rights in violation of the anti-trafficking provisions should be void. See *Emerald Cities Collaborative, Inc. v. Roese*, 666 F. App’x 908 (Fed. Cir. 2016). UNIP’s acquisition of common law rights during the opposition proceeding appears to be an attempt to traffic in marks to gain an advantage in the proceeding, and it should be void.

CONCLUSION

This Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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**APPENDIX A — OPINION OF THE UNITED STATES
COURT OF APPEALS FOR THE FEDERAL CIRCUIT,
FILED DECEMBER 10, 2025**

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

2024-1407

GAME PLAN, INC.,

Appellant,

v.

UNINTERRUPTED IP, LLC,

Appellee.

Appeal from the United States Patent and Trademark
Office, Trademark Trial and Appeal Board in No.
91244990.

Decided: December 10, 2025

Before PROST, REYNA, and CUNNINGHAM, *Circuit
Judges.*

REYNA, *Circuit Judge.*

Game Plan, Inc. appeals a final decision of the
Trademark Trial and Appeal Board cancelling its
registration for its stylized mark—I AM MORE THAN

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AN ATHLETE. GP GAME PLAN—and dismissing Game Plan’s opposition to Uninterrupted IP, LLC’s six intent-to-use applications for marks containing I AM MORE THAN AN ATHLETE and MORE THAN AN ATHLETE. For the reasons explained below, we affirm.

BACKGROUND

I.

Game Plan, Inc. (“Game Plan”) is a non-profit organization that aims to assist student-athletes in underserved communities. On December 28, 2016, Game Plan applied to register the following mark with the U.S. Patent and Trademark Office (“PTO”):

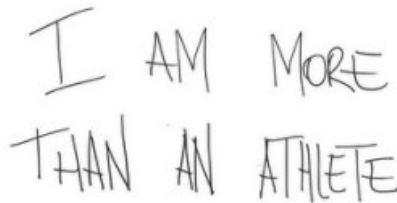
**I AM MORE
THAN AN
ATHLETE.**



See Registration No. 5,487,497 (“Game Plan’s Mark”). The PTO registered the mark on June 5, 2018. Game Plan’s mark covers “[c]haritable fundraising services by means of selling t-shirts to raise funds for educational and entertainment programs.” J.A. 69 (cleaned up).

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Uninterrupted IP, LLC (“UNIP”) is a media company that provides a platform for athletes to express their identities beyond sports through storytelling, digital content, and apparel. In March 2018, UNIP filed six intent-to-use applications for marks incorporating the phrases I AM MORE THAN AN ATHLETE and MORE THAN AN ATHLETE in standard and stylized fonts, as shown below (“UNIP’s proposed marks”).¹

The image shows the phrase "I AM MORE THAN AN ATHLETE" written in a casual, handwritten style. The text is arranged in two lines: "I AM MORE" on the top line and "THAN AN ATHLETE" on the bottom line. The letters are slightly slanted and have a rough, sketched appearance.

UNIP’s proposed marks cover clothing and entertainment services such as “a website featuring non-downloadable videos, podcasts, films and social media posts in the field of sports.” J.A. 1-2.

II.

On November 28, 2018, Game Plan initiated an opposition proceeding with the PTO Trademark Trial and Appeal Board (“Board”) to oppose registration of UNIP’s proposed marks. J.A. 66-69. Game Plan asserted

1. UNIP’s intent to use applications correspond to U.S. Trademark Application Serial Nos. 87/828,960; 87/828,964; 87/828,965; and 87/828,966 (filed Mar. 10, 2018); 87/836,363 and 87/836,358 (filed Mar. 15, 2018) (“UNIP’s applications”).

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that there was a likelihood of confusion, under Section 2(d) of the Lanham Act, 15 U.S.C. § 1052(d), between UNIP's proposed marks and its registered mark and that it had priority over UNIP's proposed marks. Game Plan also asserted common law rights as a basis for its Section 2(d) claim against UNIP's applications.

UNIP answered Game Plan's Amended Notice of Opposition on April 8, 2019. In its answer, UNIP denied any likelihood of confusion between the marks and alternatively counterclaimed to cancel Game Plan's registration under Section 2(d) of the Lanham Act. UNIP asserted that cancellation was proper because, if there was a likelihood of confusion, it had priority over Game Plan's mark based on its common law rights in the mark MORE THAN AN ATHLETE. However, UNIP acquired common law rights to the mark MORE THAN AN ATHLETE through an asset purchase agreement (the "2019 Assignment") that was executed on February 22, 2019, *after* Game Plan filed its Notice of Opposition. Relevant to this appeal, the 2019 Assignment transferred to UNIP both the mark MORE THAN AN ATHLETE and "all of the goodwill of the business related to" the mark. J.A. 152. UNIP purchased the common law rights from DeAndra Alex and her company, More Than an Athlete, Inc. ("MTAA"), which had used the mark MORE THAN AN ATHLETE since at least 2012 in connection with clothing and community events.

*Appendix A***III.**

The case proceeded to trial before the Board, which issued findings and conclusions on the parties' claims. *See Game Plan, Inc. v. Uninterrupted IP, LLC*, No. 91244990, 2023 WL 8664497 (T.T.A.B. Dec. 14, 2023) ("*Final Decision*"). The Board's Final Decision addressed both evidentiary issues and the substantive merits of the parties' claims. First, the Board dismissed Game Plan's opposition because Game Plan had submitted no evidence at trial. Given the lack of evidence, the Board concluded that Game Plan could not maintain its Section 2(d) claims based on its common law rights alone, noting "[i]t is impossible to prevail based on a claim of common law rights in a Board proceeding without evidence or an admission in the record establishing prior use of the mark." *Final Decision* at *3.

The Board next assessed UNIP's Section 2(d) counterclaim, focusing entirely on the issue of priority because Game Plan conceded likelihood of confusion. The Board found that UNIP acquired valid and enforceable common law rights in the mark MORE THAN AN ATHLETE from Ms. Alex and MTAA.

The Board rejected Game Plan's arguments that the assignment of MORE THAN AN ATHLETE was invalid because the rights were assigned during the litigation. Game Plan argued this was improper "because UNIP made the purchase after the start of this action, in order to litigate from a changed position." *Final Decision* at *7. The Board cited persuasive authority for the proposition

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that motives for assignment during litigation are not dispositive. *Id.* (citing *Dial-A-Mattress Operating Corp. v. Mattress Madness, Inc.*, 841 F. Supp. 1339, 1348 n.10 (E.D.N.Y. 1994) (“However, the motivation for a sale is irrelevant and senior user status may be properly achieved by assignment in anticipation or in the midst of litigation.”)). The Board also rejected Game Plan’s argument that UNIP’s common law rights were unenforceable because it did not intend to offer certain services associated with the goodwill of the mark (e.g., publicity or charitable services). The Board explained that although UNIP may not have acquired enforceable rights in services for which it had no continuing use, the assignment of common law rights in connection with clothing was valid and sufficient to sustain its counterclaim. The Board accordingly held that UNIP had priority over Game Plan and canceled Game Plan’s registration.

Game Plan timely appealed. We have jurisdiction under 28 U.S.C. § 1295(a)(4)(B).

STANDARD OF REVIEW

We review the Board’s legal determinations de novo and its factual findings for substantial evidence. *Princeton Vanguard, LLC v. Frito-Lay N. Am., Inc.*, 786 F.3d 960, 964 (Fed. Cir. 2015). Substantial evidence means “‘such relevant evidence as a reasonable mind would accept as adequate’ to support a conclusion.” *Id.* (quoting *In re Pacer Tech.*, 338 F.3d 1348, 1349 (Fed. Cir. 2003)). The Court reviews Board evidentiary rulings for abuse of discretion. *Cai v. Diamond Hong, Inc.*, 901 F.3d 1367, 1370 (Fed. Cir.

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2018). We will reverse the Board's evidentiary ruling only if the ruling was: (1) clearly unreasonable, arbitrary, or fanciful; (2) based on an erroneous conclusion of law; (3) premised on clearly erroneous findings of fact; or (4) the record contains no evidence on which the Board could rationally base its decision. *Id.*

DISCUSSION

Game Plan, Inc. raises two issues on appeal. First, it argues that the Board erred in determining that UNIP had priority over Game Plan's mark based on the 2019 Assignment of common law trademark rights. Appellant Br. 16-22. Second, it argues that the Board failed to review evidence supporting its assertion that the 2019 Assignment is invalid. Appellant Br. 22-27. We address each argument in turn.

I.

Game Plan argues that the Board erred in determining that UNIP had priority over Game Plan's mark because the 2019 Assignment violates 15 U.S.C. § 1060(a)(1) and 37 C.F.R. § 2.133(a). Appellant Br. 1, 17. We disagree.

A.

Game Plan asserts that the 2019 Assignment violates the trademark antitrafficking rule under 15 U.S.C. § 1060(a)(1) for two reasons. First, Game Plan contends that the 2019 Assignment is an assignment in gross. Appellant Br. 13. An assignment in gross is a sale of a trade

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name or mark divorced from its goodwill. *See Visa, U.S.A., Inc. v. Birmingham Tr. Nat'l Bank*, 696 F.2d 1371, 1375 (Fed. Cir. 1982). Game Plan argues that such assignments violate § 1060(a)(1), which states “[a] registered mark or a mark for which an application to register has been filed shall be assignable with the good will of the business in which the mark is used.” 15 U.S.C. § 1060(a)(1). Indeed, we have similarly noted that “a trademark cannot be validly assigned unless accompanied by its goodwill garnered in the marketplace.” *Gaia Techs., Inc. v. Reconversion Techs., Inc.*, 93 F.3d 774, 777 (Fed. Cir. 1996), *amended on reh'g in part*, 104 F.3d 1296 (Fed. Cir. 1996).

However, the Board’s conclusion that the 2019 Assignment is not an assignment in gross and satisfies the requirement to transfer goodwill under § 1060(a)(1) is supported by substantial evidence and is otherwise not contrary to the law. First, the 2019 Assignment expressly defined the purchased assets as trademarks, among other intellectual property, “together with the goodwill of the business associated therewith.” J.A. 263; *see also* J.A. 153. This evidence supports the Board’s determination that the mark MORE THAN AN ATHLETE was not divorced from its goodwill when assigned. The Board also determined that the 2019 Assignment was not in gross because UNIP’s use of the mark was substantially similar to Ms. Alex’s use, and UNIP and MTAA shared a common purpose and audience. *Final Decision* at *8. This finding was supported by evidence that both companies used the mark in connection with the sale of t-shirts and similar clothing as “a part of a larger effort that relates to the well-being of athletes.” *Id.*; *see also* J.A. 129-33, 256-58.

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The Board further noted that UNIP retained Ms. Alex as a consultant. *Final Decision* at *7. The Board found that this evidence demonstrated continuity of goodwill associated with the acquired mark. *Id.* at *8. We agree that the 2019 Assignment does not constitute an assignment in gross.

Second, Game Plan asserts that § 1060(a)(1) bars the 2019 Assignment. Appellant Br. 17-18. This argument lacks merit because it is based on a fundamental misunderstanding of 15 U.S.C. § 1060(a)(1). Section 1060(a)(1) provides that:

[N]o application to register a mark under section 1051(b) of this title shall be assignable prior to the filing of an amendment under section 1051(c) of this title to bring the application into conformity with section 1051(a) of this title or the filing of the verified statement of use under section 1051(d) of this title, except for an assignment to a successor to the business of the applicant, or portion thereof, to which the mark pertains, if that business is ongoing and existing.

15 U.S.C. § 1060(a)(1). Section 1060 therefore restricts the assignment of intent-to-use applications before an amendment to allege use or a verified statement of use is filed.

Here, UNIP did not *assign* its pending intent-to-use applications. Rather, it *received* an assignment

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of preexisting common law rights to an already-used mark. J.A. 263. Section 1060(a)(1) does not prohibit the assignment of such rights. Thus, UNIP did not violate § 1060(a)(1) when it purchased common law rights to the mark MORE THAN AN ATHLETE.

B.

Second, Game Plan argues that the timing of the 2019 Assignment violated 37 C.F.R. § 2.133(a). Appellant Br. 17. We disagree. Section 2.133(a) governs amendments to trademark applications or registrations during opposition and cancellation proceedings. 37 C.F.R. § 2.133(a). It provides that:

An application subject to an opposition may not be amended in substance nor may a registration subject to a cancellation be amended or disclaimed in part, except with the consent of the other party or parties and the approval of the Trademark Trial and Appeal Board, or upon motion granted by the Board.

Id. Game Plan asserts that UNIP's 2019 Assignment should be treated as a substantive amendment to its six intent-to-use applications and therefore prohibited because the assignment occurred after Game Plan filed its Notice of Opposition. Appellant Br. 12. However, Game Plan cites no authority supporting its claim that the acquisition of common law trademark rights constitutes an "amend[ment] in substance" within the meaning of § 2.133(a). *Id.*

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In any event, we need not resolve this question because Game Plan's argument fails for a more fundamental reason. That is, Game Plan's argument rests on the premise that the Board based its priority determination on UNIP's pending intent-to-use applications. It did not. Rather, the Board sustained UNIP's priority claim based on its ownership of common law rights in the mark MORE THAN AN ATHLETE, which independently predate Game Plan's filing date. Section 2.133(a) governs amendments to pending applications or registrations subject to cancellation; it does not govern the independent transfer or acquisition of common law rights to a mark. Thus, UNIP's common law rights would still establish priority over Game Plan's registration independent of any constraints imposed by § 2.133(a).

In sum, because the Board's decision rested on validly assigned common law rights and not on UNIP's six intent-to-use applications, any procedural limitations on amending those applications are irrelevant to the Board's priority analysis.

II.

Finally, Game Plan argues that the Board erred by failing to objectively review certain evidence Game Plan submitted to support its claims that UNIP's actions constituted an assignment in gross. Appellant Br. 22-29. We disagree.

Under the regulations governing trial testimony, only materials properly made of record may be considered.

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See, e.g., 37 C.F.R. §§ 2.122, 2.123. Accordingly, parties to opposition and cancellation proceedings before the Board must comply with specific procedural requirements for introducing evidence during trial. Parties typically submit evidence during trial by notices of reliance under § 2.122(g) or by witness testimony under § 2.123. Section 2.122 identifies certain materials that are automatically included in the record, including “[t]he file of each application or registration specified in a notice of interference, of each application or registration specified in the notice of a concurrent use registration proceeding, of the application against which a notice of opposition is filed, or of each registration against which a petition or counterclaim for cancellation is filed.” 37 C.F.R. § 2.122(b)(1). However, documents attached to pleadings or motions are not evidence unless properly introduced during trial. *See Cai*, 901 F.3d at 1370-71 (affirming Board’s exclusion of evidence not submitted during trial).

Further, under 37 C.F.R. § 2.132(a),

[i]f the time for taking testimony by any party in the position of plaintiff has expired and it is clear to the Board from the proceeding record that such party has not taken testimony or offered any other evidence, the Board may grant judgment for the defendant.

37 C.F.R. § 2.132(a). Thus, if an opposer fails to introduce evidence during the trial period, the applicant may move to dismiss the opposition for failure of proof. *Id.*

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Here, the Board found that Game Plan failed to properly introduce any evidence during its trial period, despite being clearly advised of the procedural requirements to do so. *Final Decision* at *1-3. Game Plan does not dispute this fact. Appellant Br. 13. Rather, as the Board noted, Game Plan attempted to rely on documents previously submitted with its motion for summary judgment. *Final Decision* at *1. Game Plan's attempt to rely on materials filed with its summary judgment motion and not reintroduced during the testimony period is improper. Accordingly, the Board did not abuse its discretion by declining to consider evidence that Game Plan had not entered into the trial record.² In sum, Game Plan was advised of the proper procedures for submitting evidence but failed to follow them, and the Board did not err by excluding evidence not submitted during the designated trial period.

CONCLUSION

We have considered Game Plan's remaining arguments and find them unpersuasive. For the reasons provided,

2. Game Plan also argues that we can rely on judicial notice to "put into perspective" the timeline of events and all evidence to understand that UNIP's actions amounted to an assignment in gross. Appellant Br. 27-29. We decline to take this approach. Game Plan's attempt to remedy this deficiency by having this court take judicial notice of the entire underlying record is improper. Indeed, the underlying record does not satisfy the requirement of being "facts of universal notoriety, which need not be proved," nor is the record "generally known within [this court's] jurisdiction[]." *B.V.D. Licensing Corp. v. Body Action Design, Inc.*, 846 F.2d 727, 728 (Fed. Cir. 1988).

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we affirm the Board's decision canceling Game Plan's registration for the mark I AM MORE THAN AN ATHLETE. GP GAME PLAN and dismissing its opposition to UNIP's intent-to-use applications.

AFFIRMED

COSTS

Costs against Game Plan.

**APPENDIX B — OPINION OF THE TRADEMARK
TRIAL AND APPEAL BOARD IN THE UNITED
STATES PATENT AND TRADEMARK OFFICE,
DATED DECEMBER 14, 2023**

This Opinion is Not a Precedent of the TTAB

UNITED STATES PATENT
AND TRADEMARK OFFICE

TRADEMARK TRIAL AND APPEAL BOARD

GAME PLAN, INC.,

v.

UNINTERRUPTED IP, LLC.

Opposition No. 91244990

Before Adlin, Thurmon and Johnson, Administrative
Trademark Judges. Opinion by Thurmon, Administrative
Trademark Judge:

Uninterrupted IP, LLC (“UNIP”) seeks registration
on the Principal Register of the marks identified below.¹

1. All the listed applications were filed on March 10, 2018, based on an alleged intent to use the marks in commerce, under Section 1(b) of the Trademark Act, 15 U.S.C. § 1051(b). The first four marks are standard character marks and the last two marks are described as the “Handwritten printed words ‘I AM MORE THAN AN ATHLETE.’” Color is not claimed as a part of any of the marks.

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Mark	Serial No.	Goods
IAMMORE THAN AN ATHLETE	87828960	entertainment services, namely, providing a website featuring non-downloadable videos, podcasts, films and social media posts in the field of sports, in International Class 41
IAMMORE THAN AN ATHLETE	87828964	clothing, namely, t-shirts, sweatshirts, hats, and jackets in International Class 25
M O R E THAN AN ATHLETE	87828963	entertainment services, namely, providing a website featuring non-downloadable videos, podcasts, films and social media posts in the field of sports, in International Class 41
M O R E THAN AN ATHLETE	87828958	clothing, namely, t-shirts, sweatshirts, hats, and jackets in International Class 25
IAMMORE THAN AN ATHLETE	87828965	clothing, namely, t-shirts, sweatshirts, hats, and jackets in International Class 25
IAMMORE THAN AN ATHLETE	87828966	entertainment services, namely, providing a website featuring non-downloadable videos, podcasts, films and social media posts in the field of sports, in International Class 41

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Game Plan, Inc. opposes the registration of the marks identified above based on Section 2(d) of the Trademark Act, 15 U.S.C. § 1052(d), alleging priority and likelihood of confusion with its registered mark shown below for “Charitable fundraising services by means of selling t-shirts to raise funds for educational and entertainment programs,” in International Class 36.

**I AM MORE
THAN AN
ATHLETE.**



2. Registration No. 5487497 issued on June 5, 2018, from an underlying application filed December 28, 2016 under Trademark Act Section 1(a), 15 U.S.C. § 1051(a), and alleging October 8, 2017 as the date of first use and first use in commerce. The mark is described as follows: “The mark consists of the wording ‘I AM MORE THAN AN ATHLETE.’ in stylized font. The wording ‘I AM MORE’ is on the first line, ‘THAN AN’ is on the second line, and ‘ATHLETE’ is on the third line. Beneath this wording are the stylized letters ‘GP’ between the arrows. The arrow on the left is bent at an angle. Beneath the arrows and the letters ‘GP’ is the term ‘GAMEPLAN’ in stylized font.” Color is not claimed as a part of the mark.

When we cite to the record, we refer to TTABVUE, the Board’s docketing system, by docket entry and page number (e.g., 8 TTABVUE 14).

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UNIP filed an answer denying the salient allegations in the Notice of Opposition and counterclaimed under Section 2(d) seeking cancellation of Game Plan's registration of the mark shown above. UNIP alleges common law priority in the mark MORE THAN AN ATHLETE for t-shirts and a likelihood of confusion with Game Plan's mark.³ Game Plan denied that UNIP has priority, but admitted, consistent with its claim in the opposition, that a likelihood of confusion exists between the marks.⁴ Indeed, Game Plan has been consistent in its position that the counterclaim turns solely on the question of priority.⁵ Because we find UNIP has priority, we grant the cancellation counterclaim. Without its pleaded registration, Game Plan has no support for its Section 2(d) claims, and therefore, we dismiss the Opposition.

3. 12 TTABVUE. UNIP also pleads ownership of a trademark registration it obtained through assignment in support of its counterclaim. For reasons explained below, we find UNIP's common law rights support the counterclaim. We do not rely on the pleaded registration. *See* n.37, *infra*.

4. 13 TTABVUE.

5. 76 TTABVUE (Game Plan's Trial Brief) 7 ("Therefore, this Trial Brief is a distillation of remaining issues that focuses on priority since the parties agree there is a likelihood of confusion with the respective marks."), 8 ("From Game Plan's perspective, this incredibly litigious matter has boiled down to one issue: whether Game Plan, Inc. has priority to UNIP. ... The Parties respectively allege and therefore agree that the other party's mark or marks are confusingly similar."), 10 ("It is undisputed that UNIP and Game Plan allege the marks are confusingly similar;" with a reference to UNIP's counterclaim), 11 ("The true issue presented is whether Game Plan has priority of use to UNIP.").

*Appendix B***I. Evidentiary Issues**

Game Plan submitted no evidence during trial. Instead, “it will reference previously discovered evidence as referenced in filings already submitted to the Board.”⁶ Game Plan then “references the entire record found in 1-75 TTABVUE.”⁷ UNIP objects to this approach and argues that a party must follow the normal rules for submission of evidence during trial.⁸ We agree with UNIP, and, in fact, the Board informed the parties that “evidence submitted in connection with the motion for summary judgment is of record only for consideration of that motion. To be considered at final hearing, any such evidence must be properly introduced in evidence during the appropriate trial period.”⁹ *See also Life Zone Inc. v. Middleman Grp., Inc.*, 87 USPQ2d 1953, 1955 (TTAB 2008) (“Evidence submitted outside of the trial periods—including that attached to briefs—is untimely, and will not be considered.”).

UNIP filed a motion for judgment following the close of the testimony periods because Game Plan failed to submit any evidence. Trademark Rule 2.132 provides that the Board may grant judgment if the party in the

6. *Id.* at 11.

7. *Id.*

8. 79 TTABVUE 11-12.

9. 50 TTABVUE 9 (citing *Drive Trademark Holdings LP v. Inofin*, 83 USPQ2d 1433, 1438 n.14 (TTAB 2007); *Levi Strauss & Co. v. R. Josephs Sportswear Inc.*, 28 USPQ2d 1464 (TTAB 1993)).

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position of plaintiff (i.e., Game Plan, as Opposer here) fails to submit any evidence at trial. 37 C.F.R. § 2.132. After noting that “Opposer has not submitted evidence during its testimony period,” the Board pointed out that Opposer’s Registration is of record by rule, because it “is the subject of Applicant’s counterclaim.”¹⁰ When responding to this motion, Game Plan stated that it was “not requesting to reopen the trial testimony period, to elicit more evidence to be more persuasive to the Board” and that it “simply would like the opportunity to present its legal theory in its forthcoming Trial Brief to persuade the Board, on the merits.”¹¹ The Board again reminded Game Plan “that neither the documents attached to its notice of opposition, nor any documents attached to previous motions and responses thereto are evidence of record.”¹² With full notice that it had no evidence in the record, Game Plan proceeded and did not seek to reopen its testimony period. Instead, Game Plan referenced materials not in the record, despite the Board’s clear guidance that such practices are not allowed.

Ironically, Game Plan’s failure to submit any evidence at trial would have been fatal to its Section 2(d) claims in the Opposition, but for the filing of the cancellation counterclaim by UNIP. As we noted above, the record of Game Plan’s Registration is now part of the trial record by operation of Trademark Rule 2.122(b)(1), 37 C.F.R.

10. 75 TTABVUE 3.

11. 73 TTABVUE 9.

12. 75 TTABVUE 2 n.3.

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§ 2.122(b)(1), because this Registration is the subject of UNIP's cancellation counterclaim. While this fact saved Game Plan's Opposition from dismissal for failure to prosecute under Trademark Rule 2.132, it leaves Game Plan with no other evidence to support those claims.

We begin with UNIP's counterclaim. As indicated, only the priority element is in dispute.¹³ UNIP's priority claim is somewhat complicated, as it depends on UNIP's acquisition of trademark rights from a third party. We evaluate those matters below and we find: (1) UNIP's predecessor-in-interest had prior common law rights in the mark MORE THAN AN ATHLETE for t-shirts and similar clothing; (2) those common law rights were properly assigned to UNIP; and, (3) that UNIP continues the prior use on the same goods, thus ensuring the goodwill transferred and continues to be associated with the mark. For these reasons, we grant the counterclaim and order the cancellation of Game Plan's Registration.

Game Plan also asserted common law rights as a basis for its Section 2(d) claim against UNIP's applications. In other words, the cancellation of Game Plan's Registration would not typically, standing alone, fully resolve the claims in the Opposition. But with no evidence, Game Plan has only attorney argument about its alleged common law

13. UNIP denied that there is a likelihood of confusion in its answer to Game Plan's Notice of Opposition. UNIP has continued to argue that the marks are not likely to cause confusion. But in its counterclaim, UNIP asserts, in the alternative, that there is a likelihood of confusion, and that it has common law priority that requires cancellation of Game Plan's Registration. 12 TTABVue.

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trademark use. It is impossible to prevail based on a claim of common law rights in a Board proceeding without evidence or an admission in the record establishing prior use of the mark. There is no such evidence in the trial record.

II. The Record

The record consists of the pleadings, and by operation of Trademark Rule 2.122(b)(1), 37 C.F.R. § 2.122(b)(1), the file of the registrations subject to the petition for cancellation and the counterclaim. In addition, UNIP introduced the following evidence.

- A Notice of Reliance providing portions of the confidential discovery deposition of Sam Sesay/ Game Plan and an amended discovery response of Game Plan;¹⁴
- Trial testimony declaration of Gabriela Goldberg, Vice-President of UNIP, with exhibits;¹⁵
- Trial testimony declaration of Devin Johnson, President of UNIP, with exhibits;¹⁶

14. 64 TTABVUE (nonconfidential), 69 TTABVUE (confidential portions). The deposition was taken under Fed. R. Civ. P. 30(b)(6), meaning it was a deposition of Game Plan. Sam Sesay was the witness, and the deposition is captioned “Deposition of Sam Sesay 30(b)(6).”

15. 65 TTABVUE.

16. 66 TTABVUE.

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- Trial testimony declaration of Ricardo Viramontes, previously Vice-President of UNIP, with exhibits;¹⁷ and,
- Trial testimony deposition of DeAndra Alex, a prior user and assignor of the MORE THAN AN ATHLETE mark, with exhibits.¹⁸

Game Plan submitted no evidence at trial.

III. Entitlement to a Statutory Cause of Action

Entitlement to a statutory cause of action must be established in every inter partes case. *Austl. Therapeutic Supplies Pty. Ltd. v. Naked TM, LLC*, 965 F.3d 1370, 2020 USPQ2d 10837, at *3 (Fed. Cir. 2020), *cert. denied*, 142 U.S. 82 (2021) (citing *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 109 USPQ2d 2061, 2067 n.4 (2014)). A party in the position of plaintiff may oppose registration of a mark or petition to cancel a registration when it demonstrates an interest falling within the zone of interests protected by the statute, 15 U.S.C. §§ 1063, 1064, and a reasonable belief in damage that is proximately caused by registration of the mark. *Corcamore, LLC v. SFM, LLC*, 978 F.3d 1298, 2020 USPQ2d 11277, at *6-7 (Fed. Cir. 2020).

The record of Game Plan's pleaded Registration is in the record as a result of the counterclaim seeking

17. 67 TTABVUE.

18. 68 TTABVUE.

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cancellation of Game Plan's Registration, as we explained above. This establishes its entitlement to bring its Section 2(d) claim against UNIP. *See e.g., Austl. Therapeutic*, 2020 USPQ2d 10837, at *3; *Cunningham v. Laser Golf Corp.*, 222 F.3d 943, 55 USPQ2d 1842, 1844 (pleaded registrations "suffice to establish ... direct commercial interest"; a belief in likely damage can be shown by establishing a direct commercial interest); *Barbara's Bakery, Inc. v. Landesman*, 82 USPQ2d 1283, 1285 (TTAB 2007) (opposer's entitlement to opposition established by pleaded registration being of record and non-frivolous likelihood of confusion claim).

UNIP, as the Petitioner in the cancellation counterclaim, must demonstrate a real interest in the proceeding and a reasonable belief of damage from Game Plan's registration. Game Plan's reliance on its Registration as a basis for its claims in the Opposition show that UNIP has standing to bring the counterclaim. *Austl. Therapeutic*, 2020 USPQ2d 10837, at *3; *see also Empresa Cubana Del Tabaco v. Gen. Cigar Co.*, 753 F.3d 1270, 111 USPQ2d 1058, 1062 (Fed. Cir. 2014); *Coach Servs., Inc. v. Triumph Learning LLC*, 668 F.3d 1356, 101 USPQ2d 1713, 1727 (Fed. Cir. 2012).

IV. UNIP's Section 2(d) Counterclaim

To prevail on its Section 2(d) counterclaim, UNIP must show by a preponderance of the evidence that it has priority in its MORE THAN AN ATLETE mark, and that Game Plan's use of its mark is likely to cause confusion, mistake, or deception regarding the source of the goods

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identified Game Plan’s involved registration. 15 U.S.C. § 1052(d) (prohibiting the registration] of a mark that “[c]onsists of or comprises a mark which so resembles a mark registered in the Patent or Trademark Office, or a mark or trade name previously used in the United States by another and not abandoned, as to be likely, when used on or in connection with the goods of the applicant, to cause confusion, or to cause mistake, or to deceive.”). Game Plan concedes that a likelihood of confusion exists between the marks, so our inquiry is limited to the question of priority.

A. Priority

UNIP asserts common law rights from at least 2013 in the mark MORE THAN AN ATHLETE for t-shirts. This priority claim relies on uses made by a third-party who later assigned its rights to UNIP. Game Plan argues the assignment was in gross and that the mark was abandoned prior to the assignment. Game Plan does not directly challenge the establishment of common law rights by UNIP’s assignor, nor does Game Plan dispute that UNIP continues to use the mark on t-shirts. The assignment is the disputed part of the story. To put the assignment in context, we begin with the first uses by the assignor.

1. First Uses of the MORE THAN AN ATHLETE Mark

DeAndra Alex has been a sports lover all her life and is the founder of More Than An Athlete, Inc.¹⁹ In 2012, she

19. 68 TTABVUE 85.

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began to develop an idea to promote the non-sports side of athletes. As part of this effort, she wrote the following creed, which was a starting point for her More Than An Athlete business: “I am more than an athlete. I am a human being with integrity and purpose. I have a talent that is God-given, but I am not my talent. My talent does not define who I am, I am more than an athlete.”²⁰ Ms. Alex “decided to create some branded products that could be sold at games, online and at schools to help promote the campaign.”²¹ The first such products were wristbands and t-shirts, shown below, that Ms. Alex obtained during 2012 and sold from 2013-18.²²



20. *Id.* at 86.

21. *Id.*

22. *Id.*

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As she was developing her business idea and selling the wristbands and t-shirts, Ms. Alex also decided to try to register her mark. She filed an application on April 27, 2012, to register the mark MORE THAN AN ATHLETE for “publicity and sales promotion services” in International Class 35. Ms. Alex was successful in this effort and a registration issued on May 28, 2013.²³ She did not register the mark for the wristbands or t-shirts, but she continued to sell these goods as a part of her business.²⁴

During 2013, Ms. Alex’s “teenage son was playing basketball at a high-competition level and traveled regionally to compete and showcase in front of Division 1 college coaches and circuit writers.”²⁵ She began selling wristbands and t-shirts at the various basketball tournaments and other programs her son attended. Below Ms. Alex describes, in some detail, her first sales at such an event:

The first sales of the MORE THAN AN ATHLETE t-shirts and wristbands [sic] basketball tournaments were made at the basketball tournament named the Nike Memorial Classic in Atlanta, Georgia, May 26-29, 2013. My son’s team was a contender at this tournament, so, I decided to promote the

23. *Id.*; Registration No. 4343953.

24. 68 TTABVUE 87.

25. *Id.*

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MORE THAN AN ATHLETE campaign there. I called and spoke to someone about being a vendor at this tournament. I paid roughly \$250 to have a table and I was the only vendor there. I made a sign for MORE THAN AN ATHLETE, printed some pamphlets promoting the campaign, and loaded my car with MORE THAN AN ATHLETE t-shirts and wristbands. The MORE THAN AN ATHLETE products and campaign were a hit with coaches, parents, and kids.²⁶

From 2013-15, Ms. Alex regularly sold wristbands and t-shirts at basketball games and tournaments. These events included AAU tournaments in Georgia, Maryland, South Carolina, North Carolina, Florida, Virginia and Washington, DC.²⁷ Ms. Alex explained, “I packed my car for every tournament with the wristbands and t-shirts to publicize the MORE THAN AN ATHLETE campaign. I was trying to publicize the program, create a buzz, get kids’ attention, and raise money for MORE THAN AN ATHLETE initiatives.”²⁸ In 2017, Ms. Alex launched a new website at morethanathlete.life, where visitors to the site can “buy branded products, namely wrist bands and t-shirts, bearing the mark.”²⁹

26. *Id.*

27. *Id.* at 88.

28. *Id.*

29. *Id.* at 89.

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When Ms. Alex's son graduated from high school, her business activities shifted, as she was no longer traveling to basketball tournaments on a regular basis.³⁰ From 2015 to 2018, she worked on an academic program to aid student athletes and also "continued to sell the MORE THAN AN ATHLETE t-shirts and wristbands."³¹ In 2017, Ms. Alex developed sportswear products bearing her mark. These included long-sleeve shirts made from a performance fabric and bearing the MORE THAN AN ATHLETE mark.³² These shirts have been worn and promoted by National Football League professional football players from at least three teams.³³

We find Ms. Alex's sales of t-shirts under the MORE THAN AN ATHLETE mark were sufficient to establish valid and enforceable common law trademark rights. Her sales continued over several years and were part of a commercial business. Game Plan points to no evidence suggesting otherwise, and indeed, appears to acknowledge that Ms. Alex established prior rights when it states that "all acts by Applicant/Petitioner [UNIP] by selling and marketing 'More Than An Athlete' mark [sic] caused confusion, mistake, dilution, and deception against the Opposer/Respondent [Game Plan]"³⁴ We understand

30. *Id.*

31. *Id.*

32. *Id.* at 89-90.

33. *Id.* at 89.

34. 14 TTABVUE 3 (answer to counterclaim).

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this assertion to mean that Ms. Alex had trademark rights.

There is also evidence that Ms. Alex objected to Game Plan's intended use of its mark. Ms. Alex became aware of Game Plan's trademark application and she reached out to Samuel Sesay, the owner of Game Plan, to express her concerns with Game Plan's trademark application.³⁵ Game Plan did not withdraw its application after this discussion, and therefore, Ms. Alex filed a letter of protest with the USPTO concerning Game Plan's application.³⁶ Ms. Alex later sought extensions of time to oppose, but she did not bring an opposition proceeding to block Game Plan's application.³⁷

In the summer of 2018, Ms. Alex, acting through counsel, also contacted UNIP to object to its use of MORE THAN AN ATHLETE as a mark.³⁸ As Ms. Alex explains, that first contact led to business discussions with UNIP.

That letter led to further communications with
Uninterrupted that ultimately concluded with

35. *Id.* at 91; 69 TTABVUE (confidential deposition transcript excerpts) 30 (Mr. Sesay referring to a phone conversation with Ms. Alex, stated "Mostly she was talking about they have shirts [bearing the MORE THAN AN ATHLETE mark]."), 31 (acknowledging the conversation with Ms. Alex occurred before Game Plan first started using its mark).

36. *Id.* at 92. Her letter of protest was filed on July 7, 2017.

37. *Id.*

38. *Id.* at 93.

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Uninterrupted, LLC and Uninterrupted IP, LLC (collectively, “Uninterrupted”) acquiring of all of the rights to the MORE THAN AN ATHLETE brand I had built. As the discussions with Uninterrupted progressed, I realized there was no need for me to seek cancellation of the registration for the Game Plan Mark, since I would be assigning my company’s rights to the MORE THAN AN ATHLETE mark to Uninterrupted.³⁹

The assignment, which we will discuss more below, was executed on February 22, 2019.

Game Plan argues Ms. Alex abandoned her mark before the 2019 assignment.⁴⁰ To prove abandonment, Game Plan must show that Ms. Alex (1) discontinued use; and (2) had an intent to not resume use in the foreseeable future. 15 U.S.C. § 1127; *Rivard v. Linville*, 133 F.3d 1446, 45 USPQ2d 1374, 1376 (Fed. Cir. 1998); *Imperial Tobacco Ltd. v. Philip Morris, Inc.*, 899 F.2d 1575, 14 USPQ2d 1390, 1394 (Fed. Cir. 1990); *ShutEmDown Sports Inc. v. Lacy*, 102 USPQ2d 1036, 1042 (TTAB 2012).

As we noted above, Game Plan submitted no evidence. In support of its abandonment argument, Game Plan points only to the fact that Ms. Alex’s business changed in 2013, “when she stopped using twitter to do publicity and

39. *Id.*

40. 76 TTABVUE 20-21.

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sales promotions.”⁴¹ The evidence, however, shows that Ms. Alex continued to use her mark well past 2013. Game Plan has not proven either element of its abandonment defense.

Game Plan cross-examined Ms. Alex, but her testimony was consistent with her declaration.⁴² There is no evidence to refute or contradict Ms. Alex’s testimony concerning the continuous use of her mark through 2018. In addition, Ms. Alex’s efforts to block Game Plan’s application to register its mark and her objection to UNIP’s use of its mark are efforts to enforce her rights in the MORE THAN AN ATHLETE mark, which contradict Game Plan’s assertion that she intended to permanently stop using her mark. Game Plan failed to prove an abandonment of the mark by Ms. Alex prior to the assignment. We hold, therefore, that Ms. Alex had common law trademark rights in the mark MORE THAN AN ATHLETE for t-shirts when she executed the assignment on February 22, 2019.⁴³

41. *Id.* at 21.

42. 68 TTABVUE 13-80. Game Plan’s counsel had Ms. Alex read every paragraph in her declaration and then asked, paragraph-by-paragraph, if she had any changes to make. She did not. This process continued and accounted for almost the entire deposition.

43. As we explain in the following section, Ms. Alex assigned her trademark registration and rights to her company More Than An Athlete, Inc (“MTAA”) on August 30, 2018. It was, therefore, MTAA, that assigned the trademark rights to UNIP, though both Ms. Alex and MTAA executed the primary agreement with UNIP.

*Appendix B***2. The Assignment to UNIP and Ongoing Use by UNIP**

On February 22, 2019, Ms. Alex and her “company More Than An Athlete, Inc. (‘MTAA’) entered into an Asset Purchase Agreement with Uninterrupted.”⁴⁴ Through this agreement, MTAA assigned all its rights in the MORE THAN AN ATHLETE mark to UNIP, MTAA ceased all use of its mark, and Ms. Alex was hired as a consultant by UNIP.⁴⁵ The agreement included an assignment of all goodwill in the mark.⁴⁶ There is nothing improper on the face of the agreement.

The assignment was recorded by UNIP, which constitutes prima facie evidence of the execution of the underlying assignment. Trademark Act Section 10(a)(3), 15 U.S.C. § 1060(a)(3). In the absence of evidence rebutting the assignment, we must treat UNIP as the owner of the rights MTAA owned in the MORE THAN AN ATHLETE mark. *See, e.g., Karsten Mfg. Corp. v. Editoy AG*, 79

44. 68 TTABVUE 93; 66 TTABVUE 20-22 (recorded Trademark Assignment); 25-29 (IP Assignment). Ms. Alex filed the application to register the MORE THAN AN ATHLETE mark in her own name, and assigned the resulting registration to MTAA on August 30, 2018, an assignment that is recorded with the USPTO. The Purchase Agreement, which covers more than trademark assignment, is between Ms. Alex and her company MTAA on one hand, and UNIP, on the other. A trademark assignment from MTAA to UNIP was also executed, and is recorded with the USPTO.

45. 68 TTABVUE at 93-94.

46. *Id.* at 94.

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USPQ2d 1783, 1790 n.9 (TTAB 2006) (“the law is well established that an assignee stands in the shoes of its assignor.”). *See also Sonic Distributions, Inc. v. Int’l Battery, Inc.*, 175 USPQ 255, 256 (TTAB 1972) (in the absence of rebuttal evidence, the Board must respect a recorded assignment and treat the assignee as the owner of the trademark rights).

Game Plan submitted no evidence but argues repeatedly that the assignment was invalid as an assignment in gross.⁴⁷ One reason Game Plan gives for disputing the assignment is the timing. This proceeding began on November 28, 2018, about three months before the assignment. Game Plan argues this fact alone proves there was an assignment in gross, “because UNIP made the purchase after the start of this action, in order to litigate from a changed position.”⁴⁸ “However, the motivation for a sale is irrelevant and senior user status may be properly achieved by assignment in anticipation or in the midst of litigation.” *Dial-A-Mattress Operating Corp. v. Mattress Madness, Inc.*, 841 F. Supp. 1339, 33 USPQ2d 1961, 1967 n.10 (E.D.N.Y. 1994) (citing *Money Store v. Harriscorp Fin., Inc.*, 689 F.2d 666, 678 (7th Cir. 1982)). The question of whether the assignment is valid does not turn on the reasons the parties agreed to the deal.

UNIP uses the mark MORE THAN AN ATHLETE in connection with the sale of t-shirts and similar clothing, which is effectively the same use Ms. Alex made prior

47. 76 TTABVue 17-19.

48. *Id.* at 17.

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to the assignment. Ms. Alex sold t-shirts as part of a business intended to emphasize that student athletes are students and not just athletes.⁴⁹ UNIP sells t-shirts and similar clothing as part of a business that tells stories of professional athletes' journeys, with an emphasis on the non-athletic parts of the stories.⁵⁰ For example, ESPN features UNIP's MORE THAN AN ATHLETE stories, and one season, Michael Strahan is featured talking about "his journey from a childhood in Germany to playing in the NFL and now a media personality."⁵¹

Not only does UNIP sell t-shirts and related clothing in a manner almost identical to that of its assignor, MTAA, the two businesses use the t-shirt sales in a similar manner. MTAA focused on student athletes and provided programs to help them retain their focus on academics. UNIP provides real-life stories of how leading athletes became successful.⁵² In both instances, the t-shirt sales are a part of a larger effort that relates to the well-being of athletes. We find the similarity of the businesses facilitated transfer of the goodwill Ms. Alex had developed in connection with the sale of t-shirts. UNIP even retained Ms. Alex as a consultant, another fact that supports the transfer of the goodwill. All the evidence of record supports the validity of the assignment.

49. 68 TTABVUE 89-90 (noting the need for more emphasis on academics for student athletes).

50. 66 TTABVUE 7-8.

51. *Id.* at 9.

52. 67 TTABVUE 3-4 (Declaration of Ricardo Viramontes).

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Game Plan's argument that UNIP acted improperly by acquiring Ms. Alex's prior rights does not ring true given the time line established by the evidence. Game Plan was contacted by Ms. Alex in 2017, before Game Plan started using its mark, but Game Plan did not withdraw its trademark application or change its business plans as a result. So, Game Plan's owner, Mr. Sesay, was aware of Ms. Alex's prior use of the mark well before Ms. Alex had any contact with UNIP.

We further note that the record shows Ms. Alex first contacted UNIP in the summer of 2018.⁵³ Game Plan filed its Notice of Opposition months later, on November 28, 2018.⁵⁴ In other words, Ms. Alex and UNIP were in contact before this proceeding began, which undermines Game Plan's assertions that there was something wrong with the assignment because it occurred during this proceeding. It is far more likely that UNIP and Ms. Alex were discussing the mark before Game Plan began this proceeding. In any event, as we noted above, an assignment made during litigation is not, for that reason alone, improper. We find nothing suspect about the timing of the assignment.

There is no dispute concerning the timing of the uses relevant to our priority analysis. Indeed, the evidence shows Ms. Alex's first sales occurred by May 29, 2013,⁵⁵

53. 68 TTABVUE 93.

54. 1 TTABVUE.

55. 68 TTABVUE 87 (referring to first use of the mark at "the Nike Memorial Classic in Atlanta, Georgia, May 26-29, 2013"). When we have a period during which use occurred, rather than a single

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which is well before Game Plan's December 28, 2016 filing date priority.⁵⁶ Game Plan argues that Ms. Alex abandoned her mark, but there is no evidence supporting that argument. Game Plan does not dispute that Ms. Alex was selling t-shirts during 2013 and thereafter or that she and her company MTAA entered into the assignment with UNIP on February 22, 2019. The trademark assignment means that UNIP stands in the shoes of MTAA, and UNIP, therefore, has established priority for purposes of its counterclaim.

Finally, we note that Game Plan does not dispute UNIP's continued use of the MORE THAN AN ATHLETE mark on t-shirts and similar clothing. This fact is important because it shows a continuation of the same type of use Ms. Alex was making prior to the assignment. There is continuity in the uses, the marks are the same, and the goods are the same. For all these reasons, we hold that UNIP has priority with respect to use of the mark MORE THAN AN ATHLETE on t-shirts.

date, we use the last date of the period. *See Bass Pro Trademarks, LLC v. Sportsman's Warehouse, Inc.*, 89 USPQ2d 1844, 1856 (TTAB 2008); *Osage Oil & Trans., Inc. v. Standard Oil Co.*, 226 USPQ 905, 911 n.22 (TTAB 1985) (evidence established first use in 1968-1969, therefore December 31, 1969 is date of first use); *EZ Loader Boat Trailers, Inc. v. Cox Trailers, Inc.*, 213 USPQ 597, 598 n.5 (TTAB 1982) (documentary evidence showed first use in 1977, the month and day were unknown, therefore, the Board could not presume any date earlier than the last day of the proved period).

56. Game Plan submitted no evidence so it cannot establish an earlier priority date.

*Appendix B***3. Game Plan’s Remaining Arguments Lack Merit**

Game Plan begins its Trial Brief with a story about LeBron James, a well-known professional basketball player who is apparently a principal with UNIP. According to Game Plan, Mr. Sesay attended a professional basketball game on October 8, 2017 and was with a group of persons who were wearing shirts bearing the MORE THAN AN ATHLETE mark.⁵⁷ LeBron James played in that game, according to Game Plan, and on that basis alone, Game Plan alleges that “LeBron James used Game Plan’s exact mark to rebrand UNIP’s parent company, Uninterrupted.”⁵⁸ There is no evidence in the record to support the argument that UNIP intentionally copied Game’s Plan’s mark, and we reject it for that reason.⁵⁹

Game Plan also makes much of the fact that the Board denied a motion for summary judgment filed by UNIP, in part because the Board found that UNIP cannot rely on the statutory priority date of the registration it obtained from MTAA because “it did not plead a tacking or prior

57. 76 TTABVUE 5.

58. *Id.*

59. UNIP submitted testimony from Ricardo Viramontes and Gabriela Goldberg, the persons involved in the creation of UNIP’s marks, and both testified that they had no awareness of the basketball game Game Plan references and that they did not attend the game or speak to LeBron James about the game. 65 TTABVUE 3; 67 TTABVUE 4. This testimony was not rebutted or contradicted by Game Plan.

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registration defense and thus did not provide Game Plan fair notice of reliance on Registration No. 4343953 for purposes of priority.”⁶⁰ Game Plan argues this decision by the Board means UNIP cannot rely on the assignment from Ms. Alex and MTAA to establish priority.⁶¹

Game Plan is mistaken, because the Board noted, in its decision denying the motion, that “UNIP also relies on alleged common law rights.”⁶² The Board found the common law priority claim was disputed. The Board never held that UNIP was prohibited from claiming the benefits of the assignment, only that there were disputed facts that precluded granting summary judgment. UNIP’s counterclaim, including its priority claim, is supported by Ms. Alex’s prior use and the assignment of the rights acquired through that use. The Board’s prior rulings in this proceeding did not limit UNIP from proving priority based on Ms. Alex’s assigned common law rights. To the extent Game Plan argues otherwise, it is misinterpreting the Board’s prior decisions.

Game Plan also argues that because UNIP had its own plans for use of the MORE THAN AN ATHLETE mark and did not intend to offer charitable services or offer services in schools, it could not obtain MTAA’s trademark rights.⁶³ There may be something to this argument as

60. 50 TTABVUE 7.

61. 76 TTABVUE 9.

62. 50 TTABVUE 7.

63. 76 TTABVUE 19.

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it relates to UNIP's acquisition of the registration for "publicity and sales promotion services" in International Class 35. If UNIP is not offering these services and does not intend to offer them in the future, then UNIP may not have enforceable rights as to these services. But even if that were true, it would not impact the assignment of common law rights in connection with clothing, namely t-shirts. We find the assignment valid as to the common law rights. Whether UNIP also obtained service mark rights from Ms. Alex and MTAA does not matter to the result in this proceeding because UNIP's counterclaim is supported by the common law rights it obtained.

B. Likelihood of Confusion

Game Plan conceded likelihood of confusion, a point it made repeatedly in its Trial Brief.⁶⁴

C. Conclusion

UNIP has proven its counterclaim by a preponderance of the evidence. It has priority based on the assignment from MTAA. Likelihood of confusion was conceded by Game Plan. Both elements of UNIP's Section 2(d) claim are established, and we, therefore, hold that Game Plan's Registration No. 5487497 must be cancelled.

64. See n.5, *supra*.

*Appendix B***V. Game Plan's Opposition Claims Fail Without Its Registration**

Game Plan asserted rights in its registration and common law rights in support of its Section 2(d) claims in the Opposition. We have granted UNIP's cancellation counterclaim, which eliminates Game Plan's pleaded registration. That leaves Game Plan's alleged common law rights, but Game Plan's failure to submit any trial evidence leaves those claims without any support. One cannot prove common law rights without evidence.

Game Plan, therefore, has no support for its Section 2(d) claims in the Opposition, and therefore, we dismiss those claims.

Decision: The counterclaim petition to cancel is granted, and Registration No. 5487497 will be cancelled in due course. The Opposition claims lack support and are dismissed. The six opposed Applications shall proceed.

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**APPENDIX C — ORDER OF THE UNITED
STATES COURT OF APPEALS FOR THE
FEDERAL CIRCUIT, FILED JANUARY 26, 2026**

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

GAME PLAN, INC.,

Appellant,

v.

UNINTERRUPTED IP, LLC,

Appellee.

2024-1407

Appeal from the United States Patent and Trademark
Office, Trademark Trial and Appeal Board in No.
91244990.

ON PETITION FOR PANEL REHEARING

Before PROST, REYNA, and CUNNINGHAM, *Circuit
Judges.* PERCURIAM.

O R D E R

Game Plan, Inc. filed a petition for panel rehearing.
Upon consideration thereof,

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IT IS ORDERED THAT:

The petition for panel rehearing is denied.

FOR THE COURT

January 26, 2026
Date

/s/ Jarrett B. Perlow
Jarrett B. Perlow
Clerk of Court

**APPENDIX D — RELEVANT
STATUTORY PROVISIONS INVOLVED**

15 USC § 1051

§ 1051. Application for registration; verification

(a) APPLICATION FOR USE OF TRADEMARK.

(1) The owner of a trademark used in commerce may request registration of its trademark on the principal register hereby established by paying the prescribed fee and filing in the Patent and Trademark Office an application and a verified statement, in such form as may be prescribed by the Director, and such number of specimens or facsimiles of the mark as used as may be required by the Director.

(2) The application shall include specification of the applicant's domicile and citizenship, the date of the applicant's first use of the mark, the date of the applicant's first use of the mark in commerce, the goods in connection with which the mark is used, and a drawing of the mark.

(3) The statement shall be verified by the applicant and specify that—

(A) the person making the verification believes that he or she, or the juristic person in whose behalf he or she makes the verification, to be the owner of the mark sought to be registered;

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(B) to the best of the verifier's knowledge and belief, the facts recited in the application are accurate;

(C) the mark is in use in commerce; and

(D) to the best of the verifier's knowledge and belief, no other person has the right to use such mark in commerce either in the identical form thereof or in such near resemblance thereto as to be likely, when used on or in connection with the goods of such other person, to cause confusion, or to cause mistake, or to deceive, except that, in the case of every application claiming concurrent use, the applicant shall—

(i) state exceptions to the claim of exclusive use; and

(ii) [shall] specify, to the extent of the verifier's knowledge—

(I) any concurrent use by others;

(II) the goods on or in connection with which and the areas in which each concurrent use exists;

(III) the periods of each use; and

(IV) the goods and area for which the applicant desires registration.

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(4) The applicant shall comply with such rules or regulations as may be prescribed by the Director. The Director shall promulgate rules prescribing the requirements for the application and for obtaining a filing date herein.

(b) APPLICATION FOR BONA FIDE INTENTION TO USE TRADEMARK.

(1) A person who has a bona fide intention, under circumstances showing the good faith of such person, to use a trademark in commerce may request registration of its trademark on the principal register hereby established by paying the prescribed fee and filing in the Patent and Trademark Office an application and a verified statement, in such form as may be prescribed by the Director.

(2) The application shall include specification of the applicant's domicile and citizenship, the goods in connection with which the applicant has a bona fide intention to use the mark, and a drawing of the mark.

(3) The statement shall be verified by the applicant and specify—

(A) that the person making the verification believes that he or she, or the juristic person in whose behalf he or she makes the verification, to be entitled to use the mark in commerce;

(B) the applicant's bona fide intention to use the mark in commerce;

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(C) that, to the best of the verifier's knowledge and belief, the facts recited in the application are accurate; and

(D) that, to the best of the verifier's knowledge and belief, no other person has the right to use such mark in commerce either in the identical form thereof or in such near resemblance thereto as to be likely, when used on or in connection with the goods of such other person, to cause confusion, or to cause mistake, or to deceive.

Except for applications filed pursuant to section 44 [15 USCS § 1126], no mark shall be registered until the applicant has met the requirements of subsections (c) and (d) of this section.

(4) The applicant shall comply with such rules or regulations as may be prescribed by the Director. The Director shall promulgate rules prescribing the requirements for the application and for obtaining a filing date herein.

(c) AMENDMENT OF APPLICATION UNDER SUBSECTION (B) TO CONFORM TO REQUIREMENTS UNDER SUBSECTION (A). At any time during examination of an application filed under subsection (b), an applicant who has made use of the mark in commerce may claim the benefits of such use for purposes of this Act, by amending his or her application to bring it into conformity with the requirements of subsection (a).

*Appendix D***(d) VERIFIED STATEMENT THAT TRADEMARK IS USED IN COMMERCE.**

(1) Within six months after the date on which the notice of allowance with respect to a mark is issued under section 13(b)(2) [15 USCS § 1063(b)(2)] to an applicant under subsection (b) of this section, the applicant shall file in the Patent and Trademark Office, together with such number of specimens or facsimiles of the mark as used in commerce as may be required by the Director and payment of the prescribed fee, a verified statement that the mark is in use in commerce and specifying the date of the applicant's first use of the mark in commerce and those goods or services specified in the notice of allowance on or in connection with which the mark is used in commerce. Subject to examination and acceptance of the statement of use, the mark shall be registered in the Patent and Trademark Office, a certificate of registration shall be issued for those goods or services recited in the statement of use for which the mark is entitled to registration, and notice of registration shall be published in the Official Gazette of the Patent and Trademark Office. Such examination may include an examination of the factors set forth in subsections (a) through (e) of section 2 [15 USCS § 1052]. The notice of registration shall specify the goods or services for which the mark is registered.

(2) The Director shall extend, for one additional 6-month period, the time for filing the statement of use under paragraph (1), upon written request of the applicant before the expiration of the 6-month

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period provided in paragraph (1). In addition to an extension under the preceding sentence, the Director may, upon a showing of good cause by the applicant, further extend the time for filing the statement of use under paragraph (1) for periods aggregating not more than 24 months, pursuant to written request of the applicant made before the expiration of the last extension granted under this paragraph. Any request for an extension under this paragraph shall be accompanied by a verified statement that the applicant has a continued bona fide intention to use the mark in commerce and specifying those goods or services identified in the notice of allowance on or in connection with which the applicant has a continued bona fide intention to use the mark in commerce. Any request for an extension under this paragraph shall be accompanied by payment of the prescribed fee. The Director shall issue regulations setting forth guidelines for determining what constitutes good cause for purposes of this paragraph.

(3) The Director shall notify any applicant who files a statement of use of the acceptance or refusal thereof and, if the statement of use is refused, the reasons for the refusal. An applicant may amend the statement of use.

(4) The failure to timely file a verified statement of use under paragraph (1) or an extension request under paragraph (2) shall result in abandonment of the application, unless it can be shown to the satisfaction of the Director that the delay in responding was

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unintentional, in which case the time for filing may be extended, but for a period not to exceed the period specified in paragraphs (1) and (2) for filing a statement of use.

(e) DESIGNATION OF RESIDENT FOR SERVICE OF PROCESS AND NOTICES. If the applicant is not domiciled in the United States the applicant may designate, by a document filed in the United States Patent and Trademark Office, the name and address of a person resident in the United States on whom may be served notices or process in proceedings affecting the mark. Such notices or process may be served upon the person so designated by leaving with that person or mailing to that person a copy thereof at the address specified in the last designation so filed. If the person so designated cannot be found at the address given in the last designation, or if the registrant does not designate by a document filed in the United States Patent and Trademark Office the name and address of a person resident in the United States on whom may be served notices or process in proceedings affecting the mark, such notices or process may be served on the Director.

(f) THIRD-PARTY SUBMISSION OF EVIDENCE. A third party may submit for consideration for inclusion in the record of an application evidence relevant to a ground for refusal of registration. The third-party submission shall identify the ground for refusal and include a concise description of each piece of evidence submitted in support of each identified ground for refusal. Not later than 2 months after the date on which the submission is filed, the Director shall determine whether the evidence should be included in the

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record of the application. The Director shall establish by regulation appropriate procedures for the consideration of evidence submitted by a third party under this subsection and may prescribe a fee to accompany the submission. If the Director determines that the third-party evidence should be included in the record of the application, only the evidence and the ground for refusal to which the evidence relates may be so included. Any determination by the Director whether or not to include evidence in the record of an application shall be final and non-reviewable, and a determination to include or to not include evidence in the record shall not prejudice any party's right to raise any issue and rely on any evidence in any other proceeding.

*Appendix D***15 USC § 1057****§ 1057. Certificates of registration**

(a) ISSUANCE AND FORM. Certificates of registration of marks registered upon the principal register shall be issued in the name of the United States of America, under the seal of the United States Patent and Trademark Office, and shall be signed by the Director or have his signature placed thereon, and a record thereof shall be kept in the United States Patent and Trademark Office. The registration shall reproduce the mark, and state that the mark is registered on the principal register under this Act, the date of the first use of the mark, the date of the first use of the mark in commerce, the particular goods or services for which it is registered, the number and date of the registration, the term thereof, the date on which the application for registration was received in the United States Patent and Trademark Office, and any conditions and limitations that may be imposed in the registration.

(b) CERTIFICATE AS PRIMA FACIE EVIDENCE. A certificate of registration of a mark upon the principal register provided by this Act shall be prima facie evidence of the validity of the registered mark and of the registration of the mark, of the owner's ownership of the mark, and of the owner's exclusive right to use the registered mark in commerce on or in connection with the goods or services specified in the certificate, subject to any conditions or limitations stated in the certificate.

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(c) APPLICATION TO REGISTER MARK CONSIDERED CONSTRUCTIVE USE. Contingent on the registration of a mark on the principal register provided by this Act, the filing of the application to register such mark shall constitute constructive use of the mark, conferring a right of priority, nationwide in effect, on or in connection with the goods or services specified in the registration against any other person except for a person whose mark has not been abandoned and who, prior to such filing—

(1) has used the mark;

(2) has filed an application to register the mark which is pending or has resulted in registration of the mark;
or

(3) has filed a foreign application to register the mark on the basis of which he or she has acquired a right of priority, and timely files an application under section 44(d) [15 USCS § 1126(d)] to register the mark which is pending or has resulted in registration of the mark.

(d) ISSUANCE TO ASSIGNEE. A certificate of registration of a mark may be issued to the assignee or the applicant, but the assignment must first be recorded in the United States Patent and Trademark Office. In case of change of ownership the Director shall, at the request of the owner and upon a proper showing and the payment of the prescribed fee, issue to such assignee a new certificate of registration of the said mark in the name of such assignee, and for the unexpired part of original period.

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(e) SURRENDER, CANCELLATION, OR AMENDMENT BY OWNER. Upon application of the owner the Director may permit any registration to be surrendered for cancelation, and upon cancelation appropriate entry shall be made in the records of the United States Patent and Trademark Office. Upon application of the owner and payment of the prescribed fee, the Director for good cause may permit any registration to be amended or to be disclaimed in part: *Provided*, That the amendment or disclaimer does not alter materially the character of the mark. Appropriate entry shall be made in the records of the United States Patent and Trademark Office and upon the certificate of registration.

(f) COPIES OF UNITED STATES PATENT AND TRADEMARK OFFICE RECORDS AS EVIDENCE. Copies of any records, books, papers, or drawings belonging to the United States Patent and Trademark Office relating to marks, and copies of registrations, when authenticated by the seal of the United States Patent and Trademark Office and certified by the Director, or in his name by an employee of the Office duly designated by the Director, shall be evidence in all cases wherein the originals would be evidence; and any person making application therefor and paying the prescribed fee shall have such copies.

(g) CORRECTION OF PATENT AND TRADEMARK OFFICE MISTAKE. Whenever a material mistake in a registration, incurred through the fault of the United States Patent and Trademark Office, is clearly disclosed by the records of the Office a certificate stating the fact and nature of such mistake shall be issued without charge and recorded and

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a printed copy thereof shall be attached to each printed copy of the registration and such corrected registration shall thereafter have the same effect as if the same had been originally issued in such corrected form, or in the discretion of the Director a new certificate of registration may be issued without charge. All certificates of correction heretofore issued in accordance with the rules of the United States Patent and Trademark Office and the registrations to which they are attached shall have the same force and effect as if such certificates and their issue had been specifically authorized by statute.

(h) CORRECTION OF APPLICANT'S MISTAKE. Whenever a mistake has been made in a registration and a showing has been made that such mistake occurred in good faith through the fault of the applicant, the Director is authorized to issue a certificate of correction or, in his discretion, a new certificate upon the payment of the prescribed fee: *Provided*, That the correction does not involve such changes in the registration as to require republication of the mark.

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15 USC § 1060

§ 1060. Assignment

(a)

(1) A registered mark or a mark for which an application to register has been filed shall be assignable with the good will of the business in which the mark is used, or with that part of the good will of the business connected with the use of and symbolized by the mark. Notwithstanding the preceding sentence, no application to register a mark under section 1(b) [15 USCS § 1051(b)] shall be assignable prior to the filing of an amendment under section 1(c) [15 USCS § 1051(c)] to bring the application into conformity with section 1(a) [15 USCS § 1051(a)] or the filing of the verified statement of use under section 1(d) [15 USCS § 1051(d)], except for an assignment to a successor to the business of the applicant, or portion thereof, to which the mark pertains, if that business is ongoing and existing.

(2) In any assignment authorized by this section, it shall not be necessary to include the good will of the business connected with the use of and symbolized by any other mark used in the business or by the name or style under which the business is conducted.

(3) Assignments shall be by instruments in writing duly executed. Acknowledgment shall be prima facie evidence of the execution of an assignment, and when

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the prescribed information reporting the assignment is recorded in the United States Patent and Trademark Office, the record shall be prima facie evidence of execution.

(4) An assignment shall be void against any subsequent purchaser for valuable consideration without notice, unless the prescribed information reporting the assignment is recorded in the United States Patent and Trademark Office within 3 months after the date of the assignment or prior to the subsequent purchase.

(5) The United States Patent and Trademark Office shall maintain a record of information on assignments, in such form as may be prescribed by the Director.

(b) An assignee not domiciled in the United States may designate by a document filed in the United States Patent and Trademark Office the name and address of a person resident in the United States on whom may be served notices or process in proceedings affecting the mark. Such notices or process may be served upon the person so designated by leaving with that person or mailing to that person a copy thereof at the address specified in the last designation so filed. If the person so designated cannot be found at the address given in the last designation, or if the assignee does not designate by a document filed in the United States Patent and Trademark Office the name and address of a person resident in the United States on whom may be served notices or process in proceedings affecting the mark, such notices or process may be served upon the Director.

*Appendix D***15 USC § 1068****§ 1068. Action of Director in interference, opposition, and proceedings for concurrent use registration or for cancellation**

In such proceedings the Director may refuse to register the opposed mark, may cancel the registration, in whole or in part, may modify the application or registration by limiting the goods or services specified therein, may otherwise restrict or rectify with respect to the register the registration of a registered mark, may refuse to register any or all of several interfering marks, or may register the mark or marks for the person or persons entitled thereto, as the rights of the parties hereunder may be established in the proceedings. The authority of the Director under this section includes the authority to reconsider, and modify or set aside, a decision of the Trademark Trial and Appeal Board: *Provided*, That in the case of the registration of any mark based on concurrent use, the Director shall determine and fix the conditions and limitations provided for in subsection (d) of section 2 of this Act [15 USCS § 1052(d)]. However, no final judgment shall be entered in favor of an applicant under section 1(b) [15 USCS § 1051(b)] before the mark is registered, if such applicant cannot prevail without establishing constructive use pursuant to section 7(c) [15 USCS § 1057(c)].

15 USC § 1115**§ 1115. Registration on principal register
as evidence of exclusive right to use mark; defenses**

(a) EVIDENTIARY VALUE; DEFENSES. Any registration issued under the Act of March 3, 1881, or the Act of February 20, 1905, or of a mark registered on the principal register provided by this Act and owned by a party to an action shall be admissible in evidence and shall be prima facie evidence of the validity of the registered mark and of the registration of the mark, of the registrant's ownership of the mark, and of the registrant's exclusive right to use the registered mark in commerce on or in connection with the goods or services specified in the registration subject to any conditions or limitations stated therein, but shall not preclude another person from proving any legal or equitable defense or defect, including those set forth in subsection (b), which might have been asserted if such mark had not been registered.

(b) INCONTESTABILITY; DEFENSES. To the extent that the right to use the registered mark has become incontestable under section 15 [15 USCS § 1065], the registration shall be conclusive evidence of the validity of the registered mark and of the registration of the mark, of the registrant's ownership of the mark, and of the registrant's exclusive right to use the registered mark in commerce. Such conclusive evidence shall relate to the exclusive right to use the mark on or in connection with the goods or services specified in the affidavit filed under the provisions of section 15 [15 USCS § 1065], or in the renewal application

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filed under the provisions of section 9 [15 USCS § 1059] if the goods or services specified in the renewal are fewer in number, subject to any conditions or limitations in the registration or in such affidavit or renewal application. Such conclusive evidence of the right to use the registered mark shall be subject to proof of infringement as defined in section 32 [15 USCS § 1114], and shall be subject to the following defenses or defects:

- (1) That the registration or the incontestable right to use the mark was obtained fraudulently; or
- (2) That the mark has been abandoned by the registrant; or
- (3) That the registered mark is being used, by or with the permission of the registrant or a person in privity with the registrant, so as to misrepresent the source of the goods or services on or in connection with which the mark is used; or
- (4) That the use of the name, term, or device charged to be an infringement is a use, otherwise than as a mark, of the party's individual name in his own business, or of the individual name of anyone in privity with such party, or of a term or device which is descriptive of and used fairly and in good faith only to describe the goods or services of such party, or their geographic origin; or
- (5) That the mark whose use by a party is charged as an infringement was adopted without knowledge of the registrant's prior use and has been continuously

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used by such party or those in privity with him from a date prior to (A) the date of constructive use of the mark established pursuant to section 7(c) [15 USCS § 1057(c)], (B) the registration of the mark under this Act if the application for registration is filed before the effective date of the Trademark Law Revision Act of 1988, or (C) publication of the registered mark under subsection (c) of section 12 of this Act [15 USCS § 1062(c)]: *Provided, however,* That this defense or defect shall apply only for the area in which such continuous prior use is proved; or

(6) That the mark whose use is charged as an infringement was registered and used prior to the registration under this Act or publication under subsection (c) of section 12 of this Act [15 USCS § 1062(c)] of the registered mark of the registrant, and not abandoned: *Provided, however,* That this defense or defect shall apply only for the area in which the mark was used prior to such registration or such publication of the registrant's mark; or

(7) That the mark has been or is being used to violate the antitrust laws of the United States; or

(8) That the mark is functional; or

(9) That equitable principles, including laches, estoppel, and acquiescence, are applicable.

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15 USC § 1127

**§ 1127. Construction and definitions;
intent of chapter**

In the construction of this Act, unless the contrary is plainly apparent from the context—

The United States includes and embraces all territory which is under its jurisdiction and control.

The word “commerce” means all commerce which may lawfully be regulated by Congress.

The term “principal register” refers to the register provided for by sections 1 through 22 hereof [15 USCS §§ 1051–1072], and the term “supplemental register” refers to the register provided for by sections 23 through 28 thereof [15 USCS §§ 1091–1096].

The term “person” and any other word or term used to designate the applicant or other entitled to a benefit or privilege or rendered liable under the provisions of this Act includes a juristic person as well as a natural person. The term “juristic person” includes a firm, corporation, union, association, or other organization capable of suing and being sued in a court of law.

The term “person” also includes the United States, any agency or instrumentality thereof, or any individual, firm, or corporation acting for the United States and with the authorization and consent of the United States. The

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United States, any agency or instrumentality thereof, and any individual, firm, or corporation acting for the United States and with the authorization and consent of the United States, shall be subject to the provisions of this Act in the same manner and to the same extent as any nongovernmental entity.

The term “person” also includes any State, any instrumentality of a State, and any officer or employee of a State or instrumentality of a State acting in his or her official capacity. Any State, and any such instrumentality, officer, or employee, shall be subject to the provisions of this Act in the same manner and to the same extent as any nongovernmental entity.

The terms “applicant” and “registrant” embrace the legal representatives, predecessors, successors and assigns of such applicant or registrant.

The term “Director” means the Under Secretary of Commerce for Intellectual Property and Director of the United States Patent and Trademark Office.

The term “related company” means any person whose use of a mark is controlled by the owner of the mark with respect to the nature and quality of the goods or services on or in connection with which the mark is used.

The terms “trade name” and “commercial name” mean any name used by a person to identify his or her business or vocation.

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The term “trademark” includes any word, name, symbol, or device, or any combination thereof—

- (1) used by a person, or
- (2) which a person has a bona fide intention to use in commerce and applies to register on the principal register established by this Act,

to identify and distinguish his or her goods, including a unique product, from those manufactured or sold by others and to indicate the source of the goods, even if that source is unknown.

The term “service mark” means any word, name, symbol, or device, or any combination thereof—

- (1) used by a person, or
- (2) which a person has a bona fide intention to use in commerce and applies to register on the principal register established by this Act,

to identify and distinguish the services of one person, including a unique service, from the services of others and to indicate the source of the services, even if that source is unknown. Titles, character names, and other distinctive features of radio or television programs may be registered as service marks notwithstanding that they, or the programs, may advertise the goods of the sponsor.

The term “certification mark” means any word, name, symbol, or device, or any combination thereof—

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(1) used by a person other than its owner, or

(2) which its owner has a bona fide intention to permit a person other than the owner to use in commerce and files an application to register on the principal register established by this Act,

to certify regional or other origin, material, mode of manufacture, quality, accuracy, or other characteristics of such person's goods or services or that the work or labor on the goods or services was performed by members of a union or other organization.

The term "collective mark" means a trademark or service mark—

(1) used by the members of a cooperative, an association, or other collective group or organization, or

(2) which such cooperative, association, or other collective group or organization has a bona fide intention to use in commerce and applies to register on the principal register established by this Act,

and includes marks indicating membership in a union, an association, or other organization.

The term "mark" includes any trademark, service mark, collective mark, or certification mark.

The term "use in commerce" means the bona fide use of a mark in the ordinary course of trade, and not made

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merely to reserve a right in a mark. For purposes of this Act, a mark shall be deemed to be in use in commerce—

(1) on goods when—

(A) it is placed in any manner on the goods or their containers or the displays associated therewith or on the tags or labels affixed thereto, or if the nature of the goods makes such placement impracticable, then on documents associated with the goods or their sale, and

(B) the goods are sold or transported in commerce, and

(2) on services when it is used or displayed in the sale or advertising of services and the services are rendered in commerce, or the services are rendered in more than one State or in the United States and a foreign country and the person rendering the services is engaged in commerce in connection with the services.

A mark shall be deemed to be “abandoned” if either of the following occurs:

(1) When its use has been discontinued with intent not to resume such use. Intent not to resume may be inferred from circumstances. Nonuse for 3 consecutive years shall be prima facie evidence of abandonment. “Use” of a mark means the bona fide use of such mark made in the ordinary course of trade, and not made merely to reserve a right in a mark.

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(2) When any course of conduct of the owner, including acts of omission as well as commission, causes the mark to become the generic name for the goods or services on or in connection with which it is used or otherwise to lose its significance as a mark. Purchaser motivation shall not be a test for determining abandonment under this paragraph.

The term “colorable imitation” includes any mark which so resembles a registered mark as to be likely to cause confusion or mistake or to deceive.

The term “registered mark” means a mark registered in the United States Patent and Trademark Office under this Act or under the Act of March 3, 1881, or the Act of February 20, 1905, or the Act of March 19, 1920. The phrase “marks registered in the Patent and Trademark Office” means registered marks.

The term “Act of March 3, 1881,” “Act of February 20, 1905,” or “Act of March 19, 1920,” means the respective Act as amended.

A “counterfeit” is a spurious mark which is identical with, or substantially indistinguishable from, a registered mark.

The term “domain name” means any alphanumeric designation which is registered with or assigned by any domain name registrar, domain name registry, or other domain name registration authority as part of an electronic address on the Internet.

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The term “Internet” has the meaning given that term in section 230(f)(1) of the Communications Act of 1934 (47 U.S.C. 230(f)(1)).

Words used in the singular include the plural and vice versa.

The intent of this Act is to regulate commerce within the control of Congress by making actionable the deceptive and misleading use of marks in such commerce; to protect registered marks used in such commerce from interference by State, or territorial legislation; to protect persons engaged in such commerce against unfair competition; to prevent fraud and deception in such commerce by the use of reproductions, copies, counterfeits, or colorable imitations of registered marks; and to provide rights and remedies stipulated by treaties and conventions respecting trademarks, trade names, and unfair competition entered into between the United States and foreign nations.

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15 USC § 1151

§ 1151. Purpose of 15 USCS §§ 1151 et seq.

The purpose of this Act [15 USCS §§ 1151 et seq.] is to make the results of technological research and development more readily available to industry and business, and to the general public, by clarifying and defining the functions and responsibilities of the Department of Commerce as a central clearinghouse for technical information which is useful to American industry and business.

**APPENDIX E — RELEVANT
REGULATORY PROVISIONS INVOLVED**

37 CFR 2.122

§ 2.122 Matters in evidence.

(a) APPLICABLE RULES. Unless the parties otherwise stipulate, the rules of evidence for proceedings before the Trademark Trial and Appeal Board are the Federal Rules of Evidence, the relevant provisions of the Federal Rules of Civil Procedure, the relevant provisions of Title 28 of the United States Code, and the provisions of this part. When evidence has been made of record by one party in accordance with these rules, it may be referred to by any party for any purpose permitted by the Federal Rules of Evidence.

(b) APPLICATION AND REGISTRATION FILES.

(1) The file of each application or registration specified in a notice of interference, of each application or registration specified in the notice of a concurrent use registration proceeding, of the application against which a notice of opposition is filed, or of each registration against which a petition or counterclaim for cancellation is filed forms part of the record of the proceeding without any action by the parties and reference may be made to the file for any relevant and competent purpose in accordance with paragraph (b)(2) of this section.

(2) The allegation in an application for registration, or in a registration, of a date of use is not evidence

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on behalf of the applicant or registrant; a date of use of a mark must be established by competent evidence. Specimens in the file of an application for registration, or in the file of a registration, are not evidence on behalf of the applicant or registrant unless identified and introduced in evidence as exhibits during the period for the taking of testimony. Statements made in an affidavit or declaration in the file of an application for registration, or in the file of a registration, are not testimony on behalf of the applicant or registrant. Establishing the truth of these or any other matters asserted in the files of these applications and registrations shall be governed by the Federal Rules of Evidence, the relevant provisions of the Federal Rules of Civil Procedure, the relevant provisions of Title 28 of the United States Code, and the provisions of this part.

(c) EXHIBITS TO PLEADINGS. Except as provided in paragraph (d)(1) of this section, an exhibit attached to a pleading is not evidence on behalf of the party to whose pleading the exhibit is attached, and must be identified and introduced in evidence as an exhibit during the period for the taking of testimony.

(d) REGISTRATIONS.

(1) A registration of the opposer or petitioner pleaded in an opposition or petition to cancel will be received in evidence and made part of the record if the opposition or petition is accompanied by an original or photocopy

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of the registration prepared and issued by the Office showing both the current status of and current title to the registration, or by a current copy of information from the electronic database records of the Office showing the current status and title of the registration. For the cost of a copy of a registration showing status and title, see § 2.6(b)(4).

(2) A registration owned by any party to a proceeding may be made of record in the proceeding by that party by appropriate identification and introduction during the taking of testimony or by filing a notice of reliance in accordance with paragraph (g) of this section, which shall be accompanied by a copy (original or photocopy) of the registration prepared and issued by the Office showing both the current status of and current title to the registration, or by a current copy of information from the electronic database records of the Office showing the current status and title of the registration. The notice of reliance shall be filed during the testimony period of the party that files the notice.

(e) PRINTED PUBLICATIONS AND OFFICIAL RECORDS.

(1) Printed publications, such as books and periodicals, available to the general public in libraries or of general circulation among members of the public or that segment of the public which is relevant in a particular proceeding, and official records, if the publication or official record is competent evidence and relevant to an issue, may be introduced in evidence by filing a notice of reliance on the material being offered in

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accordance with paragraph (g) of this section. The notice of reliance shall specify the printed publication (including information sufficient to identify the source and the date of the publication) or the official record and the pages to be read; and be accompanied by the official record or a copy thereof whose authenticity is established under the Federal Rules of Evidence, or by the printed publication or a copy of the relevant portion thereof. A copy of an official record of the Office need not be certified to be offered in evidence.

(2) Internet materials may be admitted into evidence under a notice of reliance in accordance with paragraph (g) of this section, in the same manner as a printed publication in general circulation, so long as the date the internet materials were accessed and their source (e.g., URL) are provided.

(f) TESTIMONY FROM OTHER PROCEEDINGS. By order of the Trademark Trial and Appeal Board, on motion, testimony taken in another proceeding, or testimony taken in a suit or action in a court, between the same parties or those in privity may be used in a proceeding, so far as relevant and material, subject, however, to the right of any adverse party to recall or demand the recall for examination or cross-examination of any witness whose prior testimony has been offered and to rebut the testimony.

(g) NOTICES OF RELIANCE. The types of evidence admissible by notice of reliance are identified in paragraphs (d)(2) and (e)(1) and (2) of this section and § 2.120(k). A notice of reliance shall be filed during the testimony period of

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the party that files the notice. For all evidence offered by notice of reliance, the notice must indicate generally the relevance of the evidence and associate it with one or more issues in the proceeding. Failure to identify the relevance of the evidence, or associate it with issues in the proceeding, with sufficient specificity is a procedural defect that can be cured by the offering party within the time set by Board order.

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37 CFR 2.133

**§ 2.133 Amendment of application
or registration during proceedings.**

(a) An application subject to an opposition may not be amended in substance nor may a registration subject to a cancellation be amended or disclaimed in part, except with the consent of the other party or parties and the approval of the Trademark Trial and Appeal Board, or upon motion granted by the Board.

(b) If, in an *inter partes* proceeding, the Trademark Trial and Appeal Board finds that a party whose application or registration is the subject of the proceeding is not entitled to registration in the absence of a specified restriction to the application or registration, the Board will allow the party time in which to file a motion that the application or registration be amended to conform to the findings of the Board, failing which judgment will be entered against the party.

(c) Geographic limitations will be considered and determined by the Trademark Trial and Appeal Board only in the context of a concurrent use registration proceeding.

(d) A plaintiff's pleaded registration will not be restricted in the absence of a counterclaim to cancel the registration in whole or in part, except that a counterclaim need not be filed if the registration is the subject of another proceeding between the same parties or anyone in privity therewith.

**APPENDIX F — LEBRON JAMES RESPONDS TO
FOX NEWS HOST ON INSTAGRAM**

ABC 15 ARIZONA

**‘I am more than an athlete’: LeBron James res
to Fox News host on Instagram**

LeBron James has a message for Fox News host Laura Ingraham: “I am more than an athlete.”

James posted the not-so-subtle message on Instagram Saturday morning along with the caption “#wewillnotshutupanddribble.”

James’ Instagram post came just hours after fellow NBA star Kevin Durant told USA Today that he thought Ingraham’s comments were “racist.”

The feud between the NBA superstar and the conservative talk show host began when James posted a video on his website “Uninterrupted.” The video featured a discussion between fellow NBA star Kevin Durant and sportscaster Cari Champion.

James and Durant discussed the current political environment, and how many athletes are beginning to use their platform for social causes.

When the discussion turned to President Trump, James didn’t parse his words.

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“The number one job in America, the point of person is someone who doesn’t understand the people and really don’t give a f*** about the people,” James said.

Ingraham didn’t hold back on her show on Thursday, calling James’ comments “R-rated.”

“This is what happens when you attempt to leave high school a year early to join the NBA and it’s always unwise to get political advice from someone who gets paid \$100 million a year to bounce a ball. Oh, and LeBron and Kevin, you’re great players, but no one voted for you. Millions elected Trump to be their coach, so keep the political commentary to yourself or as someone once said ‘shut up and dribble,’” Ingraham said.

Ingraham’s comments have caused a stir at NBA All-Star weekend in Los Angeles, where fellow NBA stars have come to James’ and Durant’s defense. Boston Celtics All-Star Jaylen Brown called Ingragam’s comments “ridiculous,” claiming that many athletes have an interest in politics, just like those with day jobs have an interest in sports.

*Alex Hider is a writer for the
E.W. Scripps National Desk. Follow him on Twitter
@alexhider.*

**APPENDIX G — LEBRON JAMES POSTS ON
SOCIAL MEDIA**

**LeBron James posts on social media after
commentator's rant about him circulates**

ESPN

Feb 17, 2018, 12:14 AM ET

LeBron James opined recently on the state of race relations in America and his view of the leadership in the White House, and he was taken to task for those stances by a Fox News host.

James was speaking with ESPN's Cari Champion in a piece taped for UNINTERRUPTED in January. James and Golden State Warriors All-Star Kevin Durant got together with Champion to talk about this weekend's All-Star Game in Los Angeles and the political climate in the country from their perspectives. They also were both highly critical of President Donald Trump.

The Miami Heat's Dwyane Wade defended James after Ingraham made her remarks. Durant, in an interview with USA Today, said Ingraham's comments were "racist" and that he received a lot of positive feedback about their conversation with Champion.

Durant told USA Today he and James have not talked about Ingraham's opinion.

"But like I said, we can't focus on that," he said. "Life is much bigger than an opinion, an ignorant comment from

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someone. It is what it is. I kind of feel sorry for her, because she's not looking through the lens of being free and what that's about. It feels bad that she doesn't know what we came from, or who we are personally."

On Saturday, Ingraham released a statement defending her comments.

"In 2003, I wrote a New York Times bestseller called 'Shut Up & Sing,' in which I criticized celebrities like the Dixie Chicks and Barbara Streisand, who were trashing then-President George W. Bush. I have used a variation of that title for more than 15 years to respond to performers who sound off on politics. ... If pro athletes and entertainers want to freelance as political pundits, then they should not be surprised when they're called out for insulting politicians. There was no racial intent in my remarks -- false, defamatory charges of racism are a transparent attempt to immunize entertainment and sports elites from scrutiny and criticism."

Ingraham added, "We stated on my show that these comments came from an ESPN podcast, which was not the case -- the content was unaffiliated with ESPN."

James is expected to address the matter further during All-Star media availability Saturday.

**APPENDIX H — LAURA INGRAHAM TOLD
LEBRON JAMES TO SHUT UP AND DRIBBLE**

**Laura Ingraham Told LeBron James To Shut Up And
Dribble; He Went To The Hoop**

FEBRUARY 19, 2018 • 5:04 PM ET

Emily Sullivan

Journalist Laura Ingraham sought to rebuke the Cleveland Cavaliers' LeBron James for "talking politics" during a recent interview — something the Fox News host believes is out of bounds for an athlete.

Ingraham said she was not interested in the political advice from "someone who gets paid \$100 million a year to bounce a ball."

James is one of the most decorated American athletes of all time, and last month, the 14-time All-Star became the youngest NBA player with 30,000 career points.

During a 17-minute interview with ESPN broadcaster Cari Champion alongside Golden State's Kevin Durant last week, James discussed family, personal growth and the challenges that come with being black and a public figure in America — including his reaction to the racial slur that was graffitied on his Los Angeles home last May. He also discussed politics and President Trump.

"The No. 1 job in America, the appointed person is someone who doesn't understand the people," the athlete

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said at one point during the interview, adding that some of the president's comments are "laughable and scary."

Ingraham responded to his comments Thursday, calling them "barely intelligible" and "ungrammatical" on her Fox News program *The Ingraham Angle*.

"It's always unwise to seek political advice from someone who gets paid \$100 million a year to bounce a ball," she said. "Keep the political comments to yourselves. ... Shut up and dribble."

The backlash was swift. "Almost all the stories accused me of 'dog-whistle' commentary, and many claimed that my line that LeBron should 'shut up and dribble' was 'racist,'" she said Friday.

The journalist insisted that she's "been using variants of that title to call out celebrities for 15 years," citing a book she wrote in 2006 called *Shut Up and Sing*.

Indeed, the comment was hardly the first Ingraham made telling left-wing celebrities to stay out of politics. Recently, she hurled this apparent zinger toward Jimmy Kimmel, a critic of the GOP's efforts to replace the Affordable Care Act: "Shut up and make us laugh every once in a while."

Ingraham's comments came in the run-up to Sunday's NBA All-Star game, in which James captained the winning team. He said Ingraham's criticism only enlarged his message: "The best thing she did was help me create more awareness" during the "best weekend" at the NBA,

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the athlete said Sunday. “I get to sit up here and talk about social injustice.”

“We will definitely not shut up and dribble. ... I mean too much to society, too much to the youth, too much to so many kids who feel like they don’t have a way out,” James continued.

“I had no idea who she is ... until now,” the athlete quipped. “So she won in that case.”

**APPENDIX I — FEDERAL CIRCUIT IP
BLOG: FEDERAL CIRCUIT AFFIRMS
CANCELLATION OF REGISTRATION BASED
ON PRIORITY OF COMMON LAW RIGHTS,
DATED JANUARY 13, 2026**

FEDERAL CIRCUIT IP BLOG

**Federal Circuit Affirms Cancellation of Registration
Based on Priority of Common Law Rights**

January 13, 2026

Authored and Edited by Ngozi D. Akingbesote, Ph.D.;
Wyatt L. Bazrod; Erik R. Puknys

In *Game Plan, Inc. v. Uninterrupted IP, LLC*, No. 2024-1407 (Fed. Cir. Dec. 10, 2025), the Federal Circuit affirmed the Trademark Trial and Appeal Board’s (TTAB), cancellation of Game Plan’s registration for the stylized mark “I AM MORE THAN AN ATHLETE. GP GAME PLAN.” After Game Plan registered its mark in 2018, Uninterrupted IP, LLC (“UNIP”) filed applications in 2018 for the mark “MORE THAN AN ATHLETE,” and subsequently acquired common law rights to the mark in 2019. The assignment of common law rights occurred during the underlying TTAB litigation between the parties. The TTAB held that UNIP’s assigned common law rights had priority and cancelled Game Plan’s registration.

On appeal, Game Plan argued the assignment violated trademark antitrafficking rules and procedural regulations. The Federal Circuit disagreed, explaining that the assignment was not an “assignment in gross” because it expressly transferred both the mark and the

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associated goodwill, as required by 15 U.S.C. § 1060(a)(1). The court found substantial evidence that UNIP's use of the mark was substantially similar to the prior owner's use, and that continuity of goodwill was maintained.

The Federal Circuit held that the timing of the assignment—during litigation—did not violate trademark law, as motives for assignment during litigation are not dispositive and such transfers are permissible when accompanied by goodwill. Additionally, the court clarified that Section 1060(a)(1) does not restrict the assignment of preexisting common law rights. Accordingly, the Federal Circuit agreed with the Board's priority determination based on UNIP's assigned common law rights.

**APPENDIX J — BLOG: FEDERAL CIRCUIT
AFFIRMS LEBRON’S PRIORITY IN MARKS I AM
MORE THAN AN ATHLETE BASED ON VALID
ASSIGNMENT OF COMMON LAW RIGHTS,
DATED JANUARY 5, 2026**

IP + Technology Law

**Federal Circuit Affirms LeBron’s Priority in Marks
I AM MORE THAN AN ATHLETE Based on Valid
Assignment of Common Law Rights**

January 5, 2026 | Jonathan Menkes and Alexander G. Trimes

Game Plan, Inc. (“Game Plan”), a nonprofit organization that supports student-athletes in underserved communities, appealed a decision of the Trademark Trial and Appeal Board (“TTAB”) to the Federal Circuit (see *Game Plan, Inc. v. Uninterrupted IP, LLC*, 2025 USPQ2D 1451 (Fed. Cir. 2025)). In the underlying TTAB proceeding, Game Plan had opposed six intent-to-use applications filed by Uninterrupted IP, LLC (“Uninterrupted”) for variations of the marks I AM MORE THAN AN ATHLETE and MORE THAN AN ATHLETE. Uninterrupted, a media company co-founded by LeBron James, promotes content focused on athletes’ identities and personal stories outside of sports. The TTAB dismissed the opposition as to all six of Uninterrupted’s applications and also granted Uninterrupted’s counterclaim to cancel Game Plan’s own registration for the mark I AM MORE THAN AN ATHLETE. GP GAMEPLAN (the registration and applications are shown below).

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Owner	Mark	Reg. / App. No.	Goods / Services
Game Plan		Reg. 5,487,497	Cl. 36: Charitable fundraising services by means of selling t-shirts to raise funds for educational and entertainment programs
Uninterrupted	I AM MORE THAN AN ATHLETE	App. 87/828,960	Cl. 41: Entertainment services, namely, providing a website featuring non-downloadable videos, podcasts, films and social media posts in the field of sports
Uninterrupted	I AM MORE THAN AN ATHLETE	App. 87/828,964	Cl. 25: Clothing, namely, t-shirts, sweatshirts, hats, and jackets
Uninterrupted		App. 87/828,965	Cl. 25: Clothing, namely, t-shirts, sweatshirts, hats, and jackets

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Uninterrupted		App. 87/828,966	Cl. 41: Entertainment services, namely, providing a website featuring non-downloadable videos, podcasts, films and social media posts in the field of sports
Uninterrupted	MORE THAN AN ATHLETE	App. 87/836,363	Cl. 41: Entertainment services, namely, providing a website featuring non-downloadable videos, podcasts, films and social media posts in the field of sports
Uninterrupted	MORE THAN AN ATHLETE	App. 87/836,358	Cl. 25: Clothing, namely, t-shirts, sweatshirts, hats, and jackets

The TTAB's rulings turned on the priority dispute stemming from a 2019 asset purchase agreement through which Uninterrupted acquired rights in the MORE THAN AN ATHLETE mark from a third party. At the Federal Circuit, Game Plan contended that the TTAB erred in determining that Uninterrupted had priority

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based on the assignment. In advancing this position, Game Plan asserted that the assignment from the third party to Uninterrupted was invalid under Section 10 of the Lanham Act (15 U.S.C. § 1060(a)(1)), claiming it was an impermissible “assignment in gross” and that it effectively amended Uninterrupted’s pending intent-to-use applications after they had been opposed. Game Plan also contended that the TTAB failed to review evidence supporting Game Plan’s assertion that the assignment was invalid.

The Federal Circuit was unpersuaded. First, it held that the assignment was not “in gross” because it expressly transferred the trademarks together with the associated goodwill. In the TTAB decision, the Board pointed to the origins of the MORE THAN AN ATHLETE mark, which was developed by founder DeAndra Alex as part of a mission-driven initiative promoting athletes’ identities beyond sports and was used in commerce through relatively modest sales of wristbands and apparel over a period of several years. Although those sales were limited in scale and largely tied to grassroots events and online channels, the TTAB concluded they were sufficient to establish a bona fide business and an identifiable source associated with the mark. The TTAB further noted that Uninterrupted and the prior owner Ms. Alex shared a common purpose and audience, reinforcing continuity in the mark’s commercial impression. Finally, Uninterrupted’s decision to retain the prior owner as a consultant supported the conclusion that the goodwill associated with the mark transferred intact rather than being severed from the trademark. In view of the evidence

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of record, the Federal Circuit agreed with the TTAB's finding that the assignment was not "in gross."

Second, the Court explained that Section 1060(a)(1)'s restrictions did not apply because Uninterrupted acquired pre-existing common law trademark rights that were already in use and were not merely intent-to-use applications. As a result, the assignment did not violate Section 1060(a)(1).

Further, the Court rejected Game Plan's "substantive amendment" argument, noting that it rested on a faulty premise: the TTAB did not base priority on Uninterrupted's applications at all, but rather on Uninterrupted's ownership of common law trademark rights that it had obtained through the assignment.

Finally, the Federal Circuit addressed Game Plan's claim that the TTAB failed to objectively evaluate evidence challenging the assignment's validity. Game Plan failed to introduce evidence during the trial phase, which is required under TTAB procedure, and instead relied on documents attached to a summary judgment motion. Because that evidence was never properly made part of the trial record, the Federal Circuit held, the TTAB acted within its discretion in declining to consider it.

Takeaway

The decision underscores several well-established principles in trademark law. First, priority of use may be established through the valid assignment of common

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law trademark rights. Second, a trademark assignment is not improper where the associated goodwill transfers with the mark, even if the assignment involves intent-to-use applications. Finally, the case serves as a cautionary reminder that procedural errors, particularly the failure to properly introduce evidence into the trial record, can be dispositive on appeal.

Brand owners and practitioners should therefore carefully evaluate trademark assignments and their litigation strategy early to avoid procedural pitfalls and preserve their ability to enforce trademark rights against third parties.